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FOREWORD

The very title of this symposium, "Aviation Transport," reflects the still rudimentary impact of air commerce on the legal system, even after due allowance for the innocence or hardihood of the editor. A few years hence, most likely, this title will seem as quaint as would today a 200-page symposium bearing the name "Railroad Transportation." The present title, however, is not a representation that the following pages are a full compendium of knowledge of the legal and quasi-legal aspects of transport by air. Indeed, while this symposium was in course of preparation its scope had to be substantially altered, to avoid duplication, by the appearance in the March, 1945 issue of the Virginia Law Review of an excellent symposium on aviation law; and various limitations have forced omission from these pages of the discussion of a number of topics, including financing flight equipment, development of standards and policies under the Civil Aeronautics Act of 1938, conflict of laws developments within and without the Warsaw Convention, relation of air mail policy to rate regulation—to mention only a few. This symposium presents primarily a series of surveys of an economic and legal nature centering about aviation's role, regulation and legal liability, including taxation, and some recent international developments.

In the first article, "The Economic Role of Air Transportation," Irston R. Barnes, CAB economist, presents an appraisal of air transportation's present economic significance and characteristics, as well as of its anticipated developments. Also of an economic nature is the following article by economist Joseph L. Nicholson, briefly pointing out some of the obstacles to optimistically low air rates.

The next three articles deal with various phases of regulation. "Federal, State and Local Jurisdiction over Civil Aviation" by Charles S. Rhyne, is a comprehensive yet compact survey of the diverse governmental spheres of action and regulation. This is followed by a discussion of "Appropriate Areas of State Economic Regulation," by Frederick G. Hamley of the National Association of Railroad and Utility Commissioners, who presents the frequently neglected statement of the case for the States. A further field of regulation, and one in which considerable developments may be expected, is explored by George C. Neal, General Counsel of CAB, under the suggestive title "The Status of Non-Scheduled Operations under the Civil Aviation Act of 1938."

The realm of legal liability is introduced in the next article by Paul Reiber, of the Air Transport Association of America, commenting upon "Some Aspects of Air Carriers' Liability," and touching on such matters as surface damage, personal injuries, *res ipsa,* limitation of liability and suggesting a balance of the conflicting interests. Dovetailing with the foregoing is the seventh article, by John Hunter, of CAA, which goes into various aspects of the dynamic field of airport law, under the title "The Conflicting Interests of Airport Owners and Nearby Property Owners." That "Aviation Law Comes Home to the Main Street Lawyer" is demonstrated by John C. Cooper, retired Vice President of Pan American Airways, whose experiences enables him to make helpful suggestions to the lawyer finding himself in the strange aviation law field.

The history of other forms of transportation indicates that we can certainly expect further legislation concerning aviation. A most timely and informative discussion of the need and prospect for legislation is contributed by S. G. Tipton, Acting President of the Air Transport Association of America, in the ninth article, "Legislative Program for Aviation."

The *Northwest Airlines* case of a few years ago brought into the limelight the matter of taxation and furnishes the occasion for a re-analysis of that topic in these pages by Ronald B. Welch, of the Bureau of Internal Revenue in his article on "The Taxation of Air Carriers," an acute analysis of the competing considerations underlying the tax problem.

The last two articles deal with international matters. An interesting light on "Influences Affecting International Aviation Policy" is given by Thomas Burke, who was for a number of years Chief of the Division of International Communications of the Department of State. The last article in the symposium, "Sequels to the Chicago Aviation Conference" by Richard K. Waldo, Department of State, presents the developments that have taken place as the aftermath of the United Nations' Aviation Conference in 1944. Of interest transcending the aviation field in its implications is the organization and functioning of the Provisional International Civil Aviation Organization, the first administrative body of the United Nations to get under way.

E. R. LATTY.

THE ECONOMIC ROLE OF AIR TRANSPORTATION

IRSTON R. BARNES*

I. THE INDUSTRY

Air transportation today occupies the same position in the national economy that rail transportation occupied a century ago. In 1846, however, the analyst projecting the role of rail transportation would have encountered fewer difficulties than are now encountered in assaying the future of air transportation. Like rail transportation in 1846, air transportation is at an early stage in its technological development; its market is likewise only partially foreshadowed in its past experience. A dynamic technology—new principles of design and of power production, a dynamic operational pattern—new organizational and managerial methods to be evolved, a dynamic market—new commercial relations to be tested as savings in time and reductions in cost enlarge the demand for air services, all of these and other factors warn that past experience affords no reliable blueprint for the future.

Air transportation today, like rail transportation a century ago, has proven itself. It is heralded as the instrument opening a new frontier. Air transportation has gone through its initial trial period. It has won a large measure of public acceptance. It is still predominantly a carrier of passengers, of mail, and of high-grade express. It has experienced a very substantial growth, but it may still prove to be dependent on government financial support, at least in establishing certain new international routes and in bringing service to less populous communities within the country. Unlike the railroads of a century ago, air carriers are subject to a considerable measure of governmental control; however, that control is not so inclusive and extensive as the present controls of rail transportation. The Civil Aeronautics Board, in terms of its statutory powers and experience, may be compared with the Interstate Commerce Commission before 1920.

A proper appraisal of the economic significance of air transportation requires that its performance be measured against that of other forms of transportation. However, a comparison without historical perspective would underestimate the potentialities of air transportation. In 1933, air carriers performed only 173 million passenger-miles of service, or less than one per cent of the total by intercity common

* Ph.B., 1926, Yale University; Ph.D., 1928, Yale University. Economic Adviser to the Civil Aeronautics Board. Instructor and Assistant Professor of Economics, Yale University, 1928-1942. Consulting Economist, Antitrust Division, Department of Justice, 1941-1944. Author of: PUBLIC UTILITY CONTROL IN MASSACHUSETTS (1930); CASES ON PUBLIC UTILITY REGULATION (1938); THE ECONOMICS OF PUBLIC UTILITY REGULATION (1942). Contributor to legal and economic journals.

carriers. In 1940, air carriers performed 1,147 million passenger-miles of service, or three per cent of the common-carrier total. The year 1933 was a year of depression; the year 1940, a prosperous year of high industrial activity. The difference in general business conditions is reflected in the increased performance of all carriers: a 52 per cent increase for the railroads, 280 per cent for the buses, and 563 per cent for the air carriers.[1]

In cargo services, the record of air transportation indicates a token performance only. In both 1932 and 1940, the air carriers accounted for only a small fraction of one per cent of the ton-miles of cargo.[2] Even as carriers of the mail, the air lines in 1940 carried only 9 million ton-miles in a total of 1.3 billion non-local mail, or seven-tenths of 1 per cent.[3]

In international operations in 1937, United States air carriers (they accounted for all but a negligible portion of the air travel to and from the United States) performed 76 million passenger-miles of service,[4] roughly 1.6 per cent of the total. In 1938, they carried three-tenths of 1 per cent of the mail;[5] they carried only 635 short tons of cargo in 1938 while surface vessels handled 98.8 million short tons.[6]

[1] PASSENGER-MILES OF TRANSPORTATION BY CLASSES OF CARRIERS, 1933 AND 1940

Carrier	1933		1940	
	Passenger-Miles (1,000,000)	Per Cent	Passenger-Miles (1,000,000)	Per Cent
Railway*	16,335	83.3	24,761	65.7
Bus**	3,091	15.8	11,733	31.2
Air	173	0.9	1,147	3.1
Total	19,599	100	37,641	100

Sources: FED. COORDINATOR OF TRANSPORTATION, PASSENGER TRAFFIC REPORT (1935) 169; I.C.C., ANNUAL REPORT (1941) 9; AIR TRANSPORT ASS'N, LITTLE KNOWN FACTS ABOUT AIR TRANSPORTATION (1944).
* Commutation travel excluded.
** Intercity bus only.

[2] TON-MILES OF CARGO TRANSPORTATION PERFORMED BY CLASSES OF CARRIERS, 1932 AND 1940

Carriers	1932		1940	
	Ton-Miles (1,000)	Per Cent	Ton-Miles (1,000)	Per Cent
Railroads	235,891,521	74.1	376,218,000	61.4
Intercity Trucks	29,976,800	9.4	48,500,000	7.9
Inland Waterways	7,976,800	2.5	117,296,000	19.1
Great Lakes	24,733,878	7.8		
Pipelines (petroleum)	19,600,000	6.2	71,279,000	11.6
Air	260	*	3,476	*
Total	318,179,259	100	613,296,476	100

Sources: C.A.B., ANNUAL AIRLINE STATISTICS, 1938-1942 (1943); FED. COORDINATOR OF TRANSPORTATION, REPORT ON REGULATION OF TRANSPORTATION AGENCIES, SEN. DOC. 152, 73d Cong., 2d Sess. (1934) 2, 261; I.C.C., ANNUAL REPORT (1941) 9.
* Less than 0.05 per cent.

[3] Air mail data from C.A.B., RECURRENT REPORTS OF MILEAGE AND TRAFFIC DATA; total mail data from POST OFFICE DEP'T, COST ASCERTAINMENT REPORT, 1940, table VII.

[4] Estimate derived from data in C.A.B., OVERSEAS AIR SERVICE PATTERN—ALL AREAS (1944). Neither the air nor the surface transportation data include travel to Mexico or Canada.

[5] C.A.B., SURVEY OF UNITED STATES OVERSEAS MAIL (1943) 18.

[6] AIRCRAFT INDUSTRY ASSN., AVIATION FACTS AND FIGURES (1945) 72; DEP'T OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES, 1940 (1941) 469.

In summary, air carriage has been the junior member in the transportation system, domestic or international. Its impressive record of growth and achievement holds the promise that it can soon become a full partner, particularly in passenger carriage.

The air-transport industry was created originally for the carriage of mail and fostered by the financial support granted by the federal government. The Post Office Department inaugurated the carriage of the domestic mail, the first service being started on May 15, 1918. Although contracts were concluded in 1920 with private operators for international mail routes, the Congress did not decide that the domestic air-mail service should be performed by private operators until 1925, when it provided for mail contracts which made financially possible the development of combined mail, express and passenger operations.[7] The Air Commerce Act of 1926 launched a program of providing civil airways, navigation aids and safety regulations.[8] In 1930, governmental policy sought further to encourage the development of commercial aviation by providing differential payments in mail contracts for the use of larger planes with passenger capacity, powered by two engines and equipped with various safety devices.[9] The Air Mail Act of 1934 amended the policy of awarding routes on the basis of competitive bids by providing for a continuing review and regulation of air-mail rates by the Interstate Commerce Commission;[10] for the moment, regulation took precedence over the promotion of air commerce. Subsequently, the Civil Aeronautics Authority, by later reorganization, the Civil Aeronautics Board, was made responsible for the granting of certificates of convenience and necessity under a general mandate to provide an air-transport system adequate for the needs of the foreign and domestic commerce of the United States, the Postal Service and the national defense.[11] The accompanying statutory instruction to fix the mail pay with reference to the financial needs of the carriers created an assured economic basis on which the industry could secure suitable flying equipment, develop operating procedures and test the market for its services.

The domestic air-transport industry has been carried on principally by interstate air carriers operating under certificates of convenience and necessity issued by the Civil Aeronautics Board. At the present time, the certificated domestic air carriers may be classified in five groups. Four carriers operate transcontinental services—American Airlines, United Air Lines, Transcontinental & Western Air and Northwest Airlines.[12] The carriers of the second group operate in a generally north and south

[7] 43 STAT. 805 (1925), 39 U. S. C. (1940 ed.) §461 *et seq.*
[8] 44 STAT. 568 (1926), 49 U. S. C. (1940 ed.) §171 *et seq.*
[9] The Watres Act, 46 STAT. 259 (1930).
[10] 48 STAT. 933 (1934), 39 U. S. C. (1940 ed.) §461 *et seq.*
[11] Civil Aeronautics Act of 1938, 52 STAT. 973 (1938), 49 U. S. C. (1940 ed.) §401 *et seq.*
[12] American operates a southern route from Boston to Los Angeles, via Washington, Nashville, Memphis and Dallas. Transcontinental & Western's route extends from Boston, New York and Washington to Los Angeles and San Francisco, via Chicago or St. Louis, and Kansas City. United has a central route from New York to San Francisco and Seattle, via Chicago, Denver, Omaha. Northwest serves the northern route from New York to Seattle, via Detroit, Milwaukee, Twin Cities; it has recently

direction; they are Eastern Air Lines, Chicago and Southern Air Lines, Braniff Airways, Western Air Lines, National Airlines and Mid-Continent Airlines.[13] A third group of air lines may be described as regional carriers. They are Pennsylvania-Central Airlines, Northeast Airlines, Colonial Airlines, Delta Air Corporation and Continental Air Lines.[14] The fourth group contains only two members, both engaged in short operations: Catalina Air Transport operates between San Francisco and Catalina Island; Essair operates a route wholly within Texas from Houston to Amarillo with intermediate stops. All American Aviation is the only carrier in the fifth class; it engages in mail and cargo operations conducted in part by conventional methods and in part by the use of in-flight pick-up equipment.

There are also a number of carriers operating under an exemption order of the Civil Aeronautics Board which permits non-scheduled operations in interstate commerce without a certificate of convenience and necessity.[15] They operate with smaller equipment and usually from a single base. There are also some intrastate common carriers operating under state certificates.

A significant amount of air-transportation services is provided by contract and charter operations. To some extent these contract and charter operations are performed by certificated air carriers. Other operations are conducted by fixed-base operators as a by-product of other aviation activities—the operation of airports, the training of pilots, the sale of personal aircraft, and the like.

United States aviation led the world before the war both in domestic and in international aviation. In 1938, the United States operated 71 thousand route miles, whereas the Soviet Union operated 66, France 41, Germany 33, and the United Kingdom 29. The United States operated its routes more intensively as is evidenced by its superiority in plane-miles flown, 81 million, more than the aggregate flown by the next four countries—the Soviet Union, the United Kingdom, Germany and

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begun operating transcontinentally to New York. In addition to their transcontinental routes, American, Transcontinental & Western, and United also operate a number of regional routes.

[13] Eastern operates along the eastern seaboard, from Boston to Miami and Brownsville. It also operates from Chicago to Miami. Chicago and Southern operates from Chicago and Detroit to New Orleans and Houston. Braniff operates between Chicago on the north, and Denver on the west, and Dallas, Houston and Brownsville on the south. Western operates from San Diego and Los Angeles to Lethbridge, Canada, via Salt Lake City and Great Falls; it also operates routes from Los Angeles to Denver and from Los Angeles to San Francisco. National operates along the eastern seaboard from Miami to New York and along the Gulf Coast from New Orleans to Jacksonville. Mid-Continent operates from the Twin Cities to New Orleans, via Des Moines or Omaha, Kansas City, Tulsa and Shreveport.

[14] The principal route of Pennsylvania-Central is from Norfolk to Detroit by way of Washington, Pittsburgh and Cleveland; it also operates a number of other routes including New York to Pittsburgh, Chicago and Milwaukee to Detroit, Buffalo to Pittsburgh, Pittsburgh to Birmingham, Norfolk to Knoxville. Northeast operates from New York to Caribou, Maine, and Moncton, New Brunswick, via Boston, and also from Boston to Montreal. Colonial operates from Montreal to New York, via Albany and has recently been awarded a route from Ottawa and Montreal to Washington, via Syracuse, Reading and Baltimore. Delta operates from Forth Worth—Dallas, to Charleston and Savannah, and also from Chicago to Miami. Continental operates from Denver to El Paso to Kansas City, and to Oklahoma City.

[15] C.A.B., Economic Regulations, §292.1 (Dec. 7, 1938), 14 CODE FED. REGS. (CUM. SUPP. 1944) §292.1.

Canada.[16] Even these figures do not properly reflect the advanced position of civil aviation in the United States, for the United States lines characteristically operated with planes of larger capacity. Considering passenger-miles as an index of service performed and combining the domestic and international operations, the United States air lines performed nearly 636 million passenger-miles of service in 1938, nine times that of Germany, and more than eleven times that of the United Kingdom.[17] The United States air lines performed 4.88 passenger-miles of passenger service per capita, four times as much as the air lines of any other nation with the sole exception of the Netherlands, whose 4.28 is more reflective of its small population than of the service performed.

International aviation made a promising beginning before the war. International aviation started in Europe where, by geographical necessity, most commercial aviation is international. Virtually every European country operated an air line with sub-

[16] MAJOR NATIONAL NETWORKS OF THE WORLD IN 1938, RANKED ACCORDING TO ROUTE-MILES AND PLANE-MILES FLOWN

	Route-Miles
1. United States	71,199
2. Union of Soviet Socialist Republics	65,865
3. France	40,833
4. Germany	32,720
5. United Kingdom	29,064
6. Italy	23,583
7. Australia	21,748
8. Netherlands	16,055
9. Canada	11,917
10. Belgium	11,388
	Plane-Miles Flown
1. United States	81,058,127
2. Union of Soviet Socialist Republics	38,460,310
3. United Kingdom	14,331,000
4. Germany	13,895,356
5. Canada	10,853,405
6. Australia	9,654,678
7. France	9,000,727
8. Italy	8,447,448
9. Netherlands	6,489,539
10. Japan	3,321,450

Source: BRITISH AIR MINISTRY, CIVIL AVIATION STATISTICIAN AND TECHNICAL REVIEW (1938) 53. The Union of Soviet Socialist Republics figure for plane miles is for 1937.

[17] RELATION OF AIR TRANSPORTATION TO POPULATION IN TERMS OF PASSENGER-MILES OF SERVICE PERFORMED IN 1938

Country	Passenger-Miles Domestic and International (Thousand)	Population (Thousand)	Passenger-Miles Per Capita
United States	635,556	130,215	4.88
Germany	73,100	79,375	0.92
United Kingdom	56,400	46,213	1.22
Soviet Union	55,507	192,696	0.29
France	38,890	41,907	0.93
Netherlands	37,330	8,729	4.28
Brazil	24,600	41,357	0.59

Sources: REPORT OF INT'L COMM. FOR AERIAL NAVIGATION (various dates); WORLD ALMANAC, 1943; DEP'T OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES, 1939 (1940) 10. (The data for the Soviet Union is for 1937.)

direct government operation. South and Central America was the second area where international commercial aviation was extensively developed, largely by European air lines. It was not until the close of the pioneer period in commercial aviation, about 1927 or 1928, that United States air lines entered the international field. At the outbreak of the war, the Germans, the French and the Italians operated to South America; the British, the Belgians and the French, to Africa; the British, the Dutch and the French, to Asia and Australia, the East Indies, and Indo-China, respectively.[18]

Prior to the war, the international air commerce of the United States was carried on almost exclusively by Pan American Airways and its affiliate, Pan American-Grace Airways. Pan American began its career in the Caribbean area where it operated from Miami to the principal islands of the Greater Antilles and the Lesser Antilles. From Brownsville it operated south through Mexico and Central America to the Canal Zone, which it also reached over the water from Cuba and Jamaica and by way of Guatemala City from New Orleans. Pan American also operated across the north coast of South America to Trinidad. Its operations from Florida crossed the Caribbean by the West Indies and the Antilles and continued on down the east coast of Brazil, serving Rio de Janeiro, Buenos Aires, and Montevideo (until larger planes made the airport inadequate) and all important intermediate cities. Pan American-Grace Airways operated from the Canal Zone south along the west coast of South America to Santiago, Chile, and across the continent to Buenos Aires. Pan American also operated from Seattle to Alaska. It was certificated to operate from San Francisco and Los Angeles to Honolulu, where one branch continued across the Pacific to the Philippine Islands, terminating at Hong Kong and Macau and at Singapore and a second branch went from the Hawaiian Islands to New Zealand. It was also authorized to operate across the Atlantic to London and to Lisbon and Marseilles.

The postwar international air network has not yet been fully determined. The Civil Aeronautics Board has announced its decision only in the *North Atlantic Route Case*.[19] Pan American was extended from London to Calcutta via middle and southeastern Europe.[20] American Airlines' subsidiary, American Overseas Airlines (formerly American Export Airlines), is certificated to operate across the stantial government participation, managerial and financial, where there was not

[18] The first transoceanic air transportation services were provided by lighter-than-air aircraft. In 1928, the Germans placed in service the Graf Zeppelin which operated commercially until 1937 when it was retired after the Hindenburg disaster. This was an airship of 3,700,000 cubic feet capacity. The Hindenburg, which was placed in service in 1936, had a capacity of 7,000,000 cubic feet. Since the Lakehurst disaster in May, 1937, when the hydrogen-inflated Hindenburg burned with a loss of thirty-six persons, the rigid airship has been in eclipse. However, in completing some 140 transoceanic trips with passengers, cargo and mail these two German ships not only demonstrated the technical possibilities of lighter-than-air transportation, but they also proved that such air operation could, at that time, be commercially successful.

[19] Docket No. 855. Decided June 1, 1945.

[20] It is authorized to serve Belgium, south Germany, Czechoslovakia, Austria, Hungary, Yugoslavia, Rumania, Bulgaria, Turkey, Lebanon, Iraq, Iran, and Afghanistan.

Atlantic via Iceland or Eire, serving northern Europe from London to Moscow.[21] Transcontinental & Western Air is authorized to operate two routes, one from Foynes and Paris via southern Europe to Cairo, the other from Spain via North Africa to Cairo, and beyond Cairo to Bombay, India.[22] Pending cases concern services to Latin America and to Asia and Australia and New Zealand.

The future may be expected to see significant changes in the organization of air-transport services. Domestic air services have thus far been conducted principally by 17 interstate air carriers, all operating as common carriers. These common carriers have functioned also as charter or contract operators for passenger and cargo, and they have indicated a desire to do so in the future. Carriers operating only on a contract or charter basis will increase in number and they may be expected to become a more significant part of the country's air transportation services.

The character of the air services performed may be significantly broadened. The carriers now certificated for domestic operations, with one or two exceptions, either are, or may readily become, trunk-line carriers operating relatively long routes between important cities. In the past, service has commonly been given to all important cities at intervals of roughly 100 miles between stops. The growth in the volume of air travel has permitted the inauguration of express services which, with the availability of large long-range equipment, will encourage direct and nonstop services between the major metropolitan centers. For the future the trunk-line carriers will be offering two types of services: the conventional services between all important cities and direct nonstop express services wherever the traffic volumes justify.

Local services have hardly been explored. A few of the carriers have evolved service patterns which give a kind of "local" service between two not-distant cities. For the most part, however, air travel has not been attractive for distances under 100 or 150 miles except where surface travel has been circuitous or otherwise handicapped. Local services may be devised to conform to different patterns and to serve divergent economic needs. Local services may operate along the route of trunk-line carriers or cross country between major cities served by trunk-line carriers. Such operations may serve as feeder routes to provide long-distance travelers with trunk-line connections and to supply air services between communities where distances are too short to make stops by the trunk-lines economical. Local services may also develop radiating from metropolitan centers, bringing air services to the smaller communities in a market area. Market-area local services will naturally be of greater economic significance where distances are great or where the terrain makes surface transport difficult or expensive. If they are to succeed, local air services must secure suitable and economical equipment to reduce costs and must eliminate the losses of time involved in getting to and from airports.

[21] Its certificate names Newfoundland, Labrador, Greenland, Iceland, Eire, United Kingdom, Netherlands, Denmark, Norway, Sweden, Finland, Estonia, Latvia, Lithuania, North Germany, Poland and the Soviet Union.

[22] Its certificate names Newfoundland, Eire, France, Switzerland, Italy, Greece, Egypt, Palestine, Trans-Jordon, Iraq, Saudi Arabia, Yemen, and Oman; also, Portugal, Spain, Algeria, Tunisia and Libya.

II. ECONOMIC CHARACTERISTICS OF AIR TRANSPORTATION

The most significant single fact to be kept in mind in appraising the future role of air transportation is that this industry has been, and still is, extraordinarily dynamic. If air transportation is to achieve its full economic potential, all decisions of public policy and all arrangements projected by the industry must allow air transport to remain dynamic. Despite the past spectacular achievements of air transportation, both military and commercial, the industry and its art are still at a very early stage in their development. In evolution of equipment, in scope of physical operations, and in economic operating results, change and growth have ever been normal in air transportation. The immediate prospect is for an extremely vigorous expansion of air transportation in which new equipment, new types of services and new operating procedures may be expected.

The record of aircraft development can be briefly illustrated by reference to such characteristics as the size (gross weight), speed, horsepower, capacity (useful load and passenger capacity), and the range of selected land planes used in commercial operations. From the Fokker F-7 to the Lockheed Constellation, the gross weight of commercial land planes increased from 9,700 pounds to 92,000 pounds, an increase of 850 per cent. The increase in useful load was relatively greater—from 2,500 pounds for the Fokker to 36,306 for the Constellation, an increase of 1,350 per cent. The characteristic land plane of 1927 carried 8 passengers; ten years later the Douglas DC-3, the most widely used commercial plane before the war, carried 21 passengers. The Constellation, the most recently developed transport plane now owned by the air lines, can carry 64 passengers. Engine power increased from 660 horsepower for the Fokker F-7 to 9,600 for the Constellation. The Fokker F-7 cruised at 97 miles an hour; the Douglas DC-2 of 1935, at 160 miles per hour; and the Constellation, at 245 miles per hour.[23] Reduced gas consumption per hour per ton of gross weight reflects the improvements in aircraft design, from 9.8 gallons for the Fokker F-10-A of 1928, to 6.7 gallons for the Douglas DC-3, to 5.3 gallons for the Constellation. The increases in range and pay loads have been remarkable. The Fokker F-7 had a range of only 100 miles with a pay load of 1,220 pounds; the Douglas DC-3 has a range of 500 miles with a pay load of 4,430 pounds. The Lockheed Constellation can carry a pay load of approximately 16,000 pounds at a range of 2,500 miles.

The dynamic aspects of air transportation can also be seen in the indices of physical operation since the present regulatory program was adopted.[24] Consider first certain indices of service development. The domestic air network expanded by 63 per cent in the route-miles certificated between 1938 and March, 1945. As of

[23] On April 17, 1944, the first Constellation, flying Transcontinental & Western Air's insignia, crossed the continent from Burbank, Calif., to Washington, D. C., 2,400 miles, in just under seven hours. Later in the same year the C-97, the Army's transport version of the Boeing Superfortress B-29, flew non-stop from Seattle to Washington, D. C., in six hours, three minutes, covering the distance of 2,323 miles at an average speed of 384 miles per hour.

[24] The period from 1938 to the present is selected because comparable statistics are available for this period only. The figures used in this section are derived from the monthly reports of the carriers to the Civil Aeronautics Board.

the end of March, 1945, there were 64 thousand miles of route certificated, of which 46 thousand were in operation.[25]

In 1938 the domestic air carriers were operating with an average of 238 planes; the number jumped to 360 in 1941, an increase of 51 per cent. In May of 1942, the Army purchased approximately half of the carriers' planes, reducing the carriers' fleet to 181 for 1942. Thereafter planes were gradually released to the carriers until they were operating 367 as of October 15, 1945. The necessities of war which reduced the carriers' fleets and restricted service patterns were met by increased utilization of equipment. Average daily utilization of aircraft, which had been 6 hours and 4 minutes in 1938, rose to 10 hours and 35 minutes for 1944, a gain of 72 per cent. The average plane traveled 795 miles per day in 1938; it traveled 1,744 in 1944. Moreover, equipment was more heavily loaded: the average revenue load increased from 1,694 pounds in 1938 to 4,122 pounds in 1945. The more spectacular gains in efficiency from the higher utilization of equipment must be regarded as essentially a war phenomenon. Indeed, such utilization with such loadings is not consistent with standards of adequate, satisfactory peacetime service; it represents what is physically possible without regard to whether all who seek service are accommodated. However, these performance figures will be a constant challenge in future operations.

The air-transport industry's record in patronage development has been as significant as in service development. For the twelve months ending March, 1945, the domestic air lines carried 4.5 million passengers, an increase of 369 per cent over 1938. In that twelve months they performed 2,560 million passenger-miles of service, a gain of 422 per cent for the same period. Greater increases were recorded in the volume of mail and express handled—656 per cent and 810 per cent, respectively.

III. THE FUTURE OF AIR TRANSPORTATION

The future economic role of air transportation will depend largely upon its specialized capacity to render a service superior to surface transportation in limited transportation markets. No one expects air transportation to become a serious rival of the private car, the bus, and the motor truck in purely local transportation, although with the development of the helicopter and other planes adapted to the requirements of short-distance operations, the absolute volume of local air transportation may be expected to become quite substantial. Nor does anyone expect air transportation to displace the railroad or the steamship as a carrier of the heavy commodities of the world. In tonnage terms, air transportation will supply a relatively small proportion of the ton-miles and passenger-miles of transportation which the world requires.

What are the characteristics of air transportation which are significant in determining its future sphere of usefulness? In the past, air transportation has emphasized speed as its principal advantage. In the future, air transportation will achieve even greater speeds, which will be more important as the volume of long-distance

[25] The wartime shortages of flying equipment forced the suspension of operations on some routes and delayed the inauguration of service on others.

travel, particularly intercontinental travel, increases. It has also offered comfort, personalized attention to the passenger's welfare and convenience, "extras" such as meals and personal service without additional charges, and a certain prestige. In the future, air transportation may be expected to play an extremely important role in supplying transportation to those parts of the world where surface transport is inadequate. By reason of its ability to operate on great-circle routes over sea or land and by reason of its declining costs and high speeds, air transport will frequently be more economical than the alternate means of surface transportation. In the carriage of cargo, air transportation offers advantages in addition to savings in time and availability where surface transportation is lacking; it can provide transportation with fewer handlings and with less danger of breakage or injury from vibration and movement. These advantages will combine to permit certain commodities to move by air which could never move to distant markets by surface carriage.

The future role of air transport depends on both its technical and its economic capabilities. Technically, air transport can not only handle passenger traffic with a speed and flexibility unmatched by other forms of transportation, but it can also handle physically all classes of manufactures and raw materials as the military transport services demonstrated during the war.

In the past, air transport has not always lived up to its schedules: adverse weather conditions have frequently delayed or interrupted flights. However, wartime achievements in radar and improved techniques in traffic control and instrument flying and landing, as well as improved weather information and more reliable aircraft, will enable air transportation to perform safely and reliably according to schedule.

What are the economic potentialities of the air transport industry? What costs and what rates will be typical of future air carrier services? These questions cannot be answered with certainty. There has never been an air-transport operation that constituted an optimum investment of capital and labor or an optimum utilization of capital investment, labor and management, as the economist defines optimum. All air lines have at all times had unused resources of capital, labor or management. Most air lines have operated a relatively small number of planes; much of the time, they have operated relatively few schedules; normally, the technical and managerial staffs have been capable of handling an expanding volume of operations; most carrier route systems, even the most heavily traveled, have been relatively extensive for the volume of traffic carried. Thus no one knows with any precision what air transportation costs should be with existing aircraft, and certainly no one knows what they can become with prospective aircraft. These uncertainties are particularly acute in the overseas operations, for Pan American had only limited experience before the war and that only with flying boats which are being displaced by land planes. Nevertheless, there is some gain in looking briefly at present costs, at their historical trends, and at some relatively informed estimates.

A downward trend in unit operating costs has resulted from both the use of larger and more efficient equipment and the development of a greater volume of

operations. The total operating expenses per available seat-mile declined from 5.88 cents for 1935 to 4.91 cents for 1944. The ten-year period witnessed a marked expansion in the relative volume of passenger traffic and a correspondingly reduced reliance upon mail revenues. In 1935 the domestic industry realized 61 per cent of its revenue from commercial (non-mail) traffic; in 1944 nearly 80 per cent of its revenues came from such sources.

The increased volume of operations has been accompanied by significant reductions in rates. The average revenue per passenger-mile declined from approximately 6 cents in 1932 to 5 cents in 1944. As of mid-1945, the average revenue per passenger mile in domestic air line service was approximately 4.75 cents. Average revenue per pound mile of mail has declined from 1.30 mills for 1935 to 0.33 mills for 1944, and express revenues have declined from 0.32 mills to 0.23 mills.[26]

Fares in international operations have been considerably higher than in the domestic, but they have begun to decline recently. The most notable reduction in recent months was that made in trans-Atlantic fares by Pan American; the one-way fare from New York to Foynes, which had been $525, or approximately 15 cents per mile, has been reduced to $249, or about 7 cents. The new one-way fare from New York to London is $375. It may be expected that substantial reductions will shortly be made for other international operations.

In considering the possible future level of air line rates, it is necessary to consider both the possible developments in aircraft technology and the developments in air line operational efficiency. The present domestic rates are based almost entirely on operation of the 21-passenger Douglas DC-3.[27] Before the war, this plane operated at an average total cost of about 68 cents per mile.[28] Its pay-load capacity is about 2½ tons, so that the cost per ton-mile of pay-load capacity was approximately 27 cents. As an indication of the improvement in aircraft technology embodied in the DC-3, it has been estimated that the Ford trimotor, commonly used in air-transport operations in the late 1920's, would have a total operating cost under present air line operating conditions of about 43 cents per ton-mile of pay-load capacity. In other words, during the eight-year interval between the development of these two planes, the cost per ton-mile was reduced by about 40 per cent as a result of aircraft improvements.

Many interrelated variables of aircraft design and performance enter into the determination of operating cost. Taking into account the possible improvements in conventional aircraft, it has been estimated that reduced costs may permit a 30 per cent cut in passenger rates and a 50 per cent cut in cargo rates. These estimates do

[26] C.A.B., ANNUAL AIRLINE STATISTICS, 1935-1940 (1940); *id.*, 1938-1942 (1943). See also monthly reports of carriers to C.A.B.

[27] As of October 15, 1945, the domestic air line fleet in actual operation consisted of 343 DC-3's, 16 Lockheed Lodestars, 3 Lockheed Electras, and 5 Boeing Stratoliners.

[28] This figure includes total air line operating expenses. The figures and most of the other statements contained in this discussion of possible future rates are based upon a series of lectures presented at Princeton University in the spring of 1945 by Dr. Edward Warner, then Vice-Chairman of the Civil Aeronautics Board.

not take into account any radical change in aircraft technology, such as the use of gas turbines, jet propulsion or similar developments.

Reductions in cost can also be achieved through improvements in air line operating efficiency. Economies in direct operation costs can be secured through increased aircraft utilization, joint use of operating facilities, and the like. Reductions can also be effected in indirect unit operating costs by spreading these expenses over an expanded volume of traffic. Cost reductions from both aircraft and air line improvements may, it has been estimated, permit domestic rates to fall to 3 cents per passenger-mile within a few years.

In the future, air transportation may be expected to utilize a variety of new aircraft. The war has stimulated the development of larger planes, more powerful and efficient power plants, and greatly expanded engineering and manufacturing capacities. The war-induced improvements in the conventional types of land planes will dominate air transportation for the immediate future. Much larger and somewhat faster planes will permit bigger pay loads per operation and more ton-miles of service per year.

Some new types of aircraft are in prospect. The helicopter is apparently not to be immediately available as a commercial vehicle. When it is able to carry substantial loads at economical costs, the helicopter will overcome one of the major weaknesses in the air transportation network—the inability of the conventional air services to operate from the business centers of the communities served. The ability of the helicopter to perform terminal services would make air transportation attractive and economical for many traveling two hundred miles or less. Moreover, the helicopter might develop local services to nearby communities, thus invading a field which has been served only by surface carriers.

The glider operating techniques developed during the war may make important contributions to the movement of air cargo. The application of glider technique holds a promise of low-cost transportation to areas where economical surface transportation is lacking.[29] Even in countries possessing highly developed transportation systems, the possibility of bringing air transportation to all communities is dependent upon finding new low-cost techniques, perhaps in the use of gliders and air trains.[30]

[29] Only in Europe, the United States and a part of Canada does there exist a transportation network adequate for modern industrial civilization.

[30] Glider operations present certain advantages over the conventional operation of the cargo plane for many types of air movement. First, no expensive investment in ground facilities is required. Second, there is very considerable saving in investment. Whereas the powered aircraft of the DC-3 type involves an initial investment of approximately $120,000, a glider developed by the Army, having a pay-load capacity of 10,000 pounds, can probably be produced for commercial operation at a cost of $30,000 to $35,000. This glider can be towed by a DC-3 plane with a loss of only 14 to 18 per cent of its normal cruising speed as the cost of increasing its pay-load capacity from the 3,000 to 3,500 pounds, which the plane itself can carry, to the 10,000 pounds which the glider can handle. Third, important economies in operating cost are available. If the powered airplane operates as the cargo carrier, it spends much of its time on the ground being loaded and unloaded; the use of the same plane as a tug to pick up and deliver loaded gliders permits the powered plane to be utilized a larger number of hours per day, reducing hourly overhead costs as well as direct flying expenses. These economies are estimated by those familiar

What are the future markets which air transportation can hope to serve? Will these markets be extensive enough to permit economical operations?

The future market for scheduled air line transportation will depend on three general classes of factors: the general level of the national income; public acceptance of air transportation from other than an economic standpoint; the competitive position of air transport in relation to competing surface transportation. The first factor is an important element in any market estimate. For present purposes it must be assumed that a high level of production and of national income, approaching full utilization of all resources, will be achieved. The general acceptance of air transportation involves the psychological, as contrasted with the economic, reaction of the public to this medium of travel—the established travel habits of the public which must be overcome before air transportation is fully utilized, and the fear of flying that still prevails among a portion of the traveling public. Both of these psychological deterrents have been greatly reduced by the war's emphasis upon aviation in general and air transportation in particular.

There remains as the primary factor for detailed consideration the competitive economic position of air lines with respect to surface transportation. The possible future level of air line rates has already been considered; it appears reasonable to expect that within the next five years passenger fares may be 3.0-3.5 cents for domestic and 4.0-5.0 cents for international operations, and that airport-to-airport cargo rates may be as low as 15 cents per ton-mile in domestic service and 20 cents in international service.

Considering first the domestic passenger market, the air lines' rates will have to compete with railroad fares which at present average 1.6 cents per mile for coach, and 2.9 cents per mile for Pullman (including berth). It should be borne in mind, however, that the railroad fare on any given trip is computed on a distance which is almost always longer than that of the air line.[31] It has been estimated that for the country as a whole the average differential between air and surface distances amounts to 15 per cent and that the railroad rates adjusted to air line distances would, therefore, amount to about 1.9 cents for coach and 3.3 cents for Pullman.[32] Under the threat of air line competition, the railroads will presumably reduce their present fares. There is little present basis for estimating how great such a reduction may be. However, it may be assumed that the new level of Pullman fares will be somewhat lower than the air fares but that the relative differential between the two will not be as great as in the past.

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with glider operations to add up to important savings, making it possible to achieve direct operating costs of 8 to 11 cents per ton-mile or total cost of 13 to 16 cents per ton-mile for cargo operation by glider. Gliders can also be loaded at the point of origin without the necessity of antecedent highway or rail carriage and delivered direct to destination, thus eliminating other transportation costs. The more careful handling of glider cargo—less hasty loading, fewer handlings, and almost complete absence of vibration—will eliminate some of the hazards of breakage and spoilage.

[31] Even under the existing fare structure, there are a number of routes where, due to the circuity of the railroad route, the air line fare is lower than the Pullman fare.

[32] Edward P. Warner, *Where Next* (Sept. 1944) 2 AIR TRANSPORT 32.

On the above assumptions, it is reasonable to expect that the air lines will early divert from surface carriers approximately 75 per cent of Pullman traffic moving distances of over 500 miles, a smaller percentage, perhaps about 30 per cent, of coach traffic moving a like distance, possibly 50 per cent of Pullman traffic traveling between 100 and 500 miles, and 15 per cent of coach travel between 100 and 500 miles. For trips of less than 100 miles, air transportation is not in a favorable competitive position. Until some experience has been obtained in local service operations, it is difficult to foresee how much of this traffic may be diverted. More important than the traffic diverted from surface common carriers will be the new traffic, business and recreational, that will be created as a result of the savings in time and costs which air travel will permit. Many trips which would not be made at all by surface transportation will in the future be made by air, particularly if fares are reduced to the levels expected. Taking into account both diverted and newly developed traffic, it has been estimated that the postwar volume of domestic air transportation will amount to 5.5 billion passenger miles per year if the present differential between air and rail fares remains. This compares with a prewar volume of some 1.5 billion passenger miles. It was further estimated that postwar air traffic might be increased to 11 billion passenger miles if air line rates are brought to equality with Pullman fares, and to 24 billion passenger miles if they are lowered to the level of coach fares.[33]

Postwar improvements in the quality of service will probably favor the railroads. The air lines have been rendering a luxury service, and although new and larger equipment will make possible certain improvements, these improvement will not represent any radical change in their service. In fact, the air lines will presumably develop a low-fare, "coach" type of service to supplement their existing service. The railroads, on the other hand, have a considerable opportunity to improve the quality of their service. To the extent that the difference in quality of service between the air lines and the railroads is narrowed, the above estimates of postwar air line traffic may prove to be somewhat overstated.

In the foreign field, the competitive relationships between air and surface carriers will differ considerably from that in domestic operations. The longer distances involved and the low speed of surface carriers give air carriers an enormous time advantage. Furthermore, the cost of first-class accommodations by ship has been, and will very likely continue to be, quite high. In addition to a substantial diversion of first-class and cabin-class traffic from the steamships, it is certain that air transport will create a large amount of new traffic. According to one of the more conservative estimates,[34] the international passenger traffic carried by United States carriers by the fifth postwar year will amount to approximately 115 million passenger-miles.

In the cargo field, the air carriers are in a far less favorable competitive position. Their primary advantage, speed, is relatively unimportant for most commodities,

[33] Warner, *op. cit. supra* note 32.

[34] McDONALD AND DREW, AIR TRANSPORTATION IN THE IMMEDIATE POST-WAR PERIOD (Curtiss-Wright Corp., 1944) 18.

while their greatest disadvantage, high cost, is of prime importance. The railroads are able to haul carload freight at less than one cent per ton-mile, less-than-carload freight at 4-5 cents, and express at 12-15 cents. If, as seems likely, the air rates cannot be brought below 15 cents per ton-mile (airport-to-airport) in the immediate future, the airlines can expect to secure only a part of the express traffic, little of the less-than-carload freight, and practically none of the carload freight. It has been estimated that, at an airport-to-airport rate of 15 cents per ton-mile, the total domestic air cargo might amount to 100 million ton-miles per year.[35] While this would represent a thirty-fold increase over the volume handled in 1940, it would still represent only one-hundredth of one per cent of the total domestic cargo transportation handled by all forms of transportation in that year.

In international cargo operations, a number of partially offsetting factors affect the competitive position of air carriers. The cargo rates by steamship are extremely low, averaging less than a cent per ton-mile. Moreover, the cargo moving in foreign trade is preponderantly of a nature that is not suited to air shipment. On the other hand, air carriers in this field benefit from the very great saving of time, both relative and absolute, in comparison with slow water transportation. For those classes of cargo for which time is important, the relative advantage of air shipment internationally will be correspondingly greater than it is domestically. In fact, certain products, such as newspapers, news-magazines, and the like, which might have virtually no market in distant countries if moved by surface transport, may move in substantial quantities by air. It has been estimated that the volume of international air cargo handled by United States carriers by 1950 might amount to about 25 million ton-miles.[36]

The above estimates of future markets relate solely to scheduled air transportation of a trunk-line nature. Other forms of commercial aviation will include feeder services, non-scheduled services (both common and contract carrier), and miscellaneous commercial operations (such as aerial photography, crop dusting, et cetera). It is impossible to predict the volume of such operations. The estimates for scheduled air transportation, although subject to a considerable margin of error, are at least based upon a past air line market and a past ground transportation market, both of which are known. In contrast, there are practically no data available regarding the past, present, or future extent and nature of other types of air operations. There is no doubt that these new aviation operations will experience a considerable growth. Some, such as feeder air lines, will be largely of an experimental nature for a number of years. All will be stimulated by the return of servicemen trained in aviation and seeking opportunities in civil aviation.

Few phases of aviation have been the subject of as many and as varied predictions as has private flying. While there can be no doubt that this market will expand greatly over prewar levels it will for some time continue to be limited by high costs, low utility, and the relatively high degree of skill required.

[35] Warner, *op. cit. supra* note 32.

[36] McDONALD AND DREW, *op. cit. supra* note 34, at 20.

There is no assurance that air transportation will be allowed to perform all services that are within its technical capacity. Only if the economic, legal and political frameworks within which air commerce operates are properly designed, will air transport be able to realize its full potential of public service. Like all new services, the success of air transport threatens an encroachment on markets occupied by other enterprises, and hence its progress meets opposition which, if effective, may suppress or distort the economic development of air transport.

Political obstacles to the full development of air transportation are significant chiefly in international air commerce. International air transport has never been simply private or commercial enterprise. International aviation developed with the generous support of the interested governments in the provision of facilities, the investment of capital and the payment of subsidies. The investment capital of many international carriers has been largely contributed by governments.[37] The payment of subsidies has taken many forms and their amounts are extremely difficult to estimate. The continuance of subsidy payments year after year before the war reflected the policy of continuous expansion of air routes and services.[38] Indeed, in the prewar years, international air lines were essentially instruments of national policy—operating to enhance the prestige of the flag they carried, and to bind colonial and dominion areas more closely to the home country. To be able to conduct such operations without regard to commercial considerations of profits was sometimes considered a source of strength.[39]

Before the war the doctrine of the national sovereignty of the air was used to further the development of a nation's airlines, international and domestic, by excluding the carriers of other nations from access to its territory or by granting access only in exchange for concessions to its air carriers. By a system of bilateral air treaties, air commerce was restrained and curtailed quite as much as it was encouraged and promoted.

To win for the air commerce of all nations a new charter of international freedom, the United States called an international civil aviation conference at Chicago

[37] British Overseas Airways Corporation, Trans-Canada Airlines, the Dutch Koninklijke Luchtvaart Maatschappij (KLM), and Ala Littoria are (or were) entirely owned by their respective governments. The Swedish Aktiebolaget Aerotransport (ABA), Air France, and the Belgian SABENA are, and the German Lufthansa was, largely governmentally owned. South African Airways is operated directly by a department of the Union of South Africa, and Aerofolt is the air transport organization of the Soviet Union.

[38] The subsidies paid are not always an outright grant; certain services are commonly exacted in return. The gross payments to United States air lines for the carriage of domestic and international mail are sometimes classified (in foreign publications usually) as subsidies. This is, of course, erroneous, as substantial services in the carriage of the mail have been performed by United States carriers. Indeed, it is significant that from 1926 to 1944, the aggregate postage revenue from air mail exceeded the aggregate payment to air carriers, domestic and international, by more than $25,000,000.

[39] In the debate in the House of Lords on the bill to create the British Overseas Airways Corporation, the following significant statement was made:

"In our view, a non-profit-making public corporation, set up by statute, will offer greater possibilities of advancing British civil aviation than a limited-liability company, which must, of course, quite properly watch its shareholders' interest and also be sure of its subsidiaries and contracts before it can embark on a farsighted development programme for the operation of new air services with up-to-date and increasingly costly aircraft." 114 HOUSE OF LORDS, PARLIAMENTARY DEBATES (1939) 737.

in September of 1944. The conference achieved significant progress in providing an intergovernmental aeronautical organization (the Provisional International Civil Aviation Organization) and in providing for the formulation of recommended standards and practices relating to the technical aspects of civil aviation. However, the conference was not equally successful in securing universal operating rights for all international carriers. The United States proposed that unrestricted transit, landing and commercial rights be available to the air lines of all signatory powers. The proposal was opposed by a number of nations out of fear that a multiplication of services and keenness of competition would prevent them from securing their share of the international air commerce.

The conference drew up an Air Transit Agreement granting rights of transit and rights of non-traffic stops to the air lines of all signatories, and this agreement has been accepted by 21 countries.[40] The Air Transport Agreement formulated by the Conference would grant to the air lines of each signatory the right to engage in air commerce between the home country and the country of each signatory, and also the right to engage in air commerce between any two signatory countries on a reasonably direct route to or from the home country. The Air Transport Agreement has been accepted without qualification by only 8 countries;[41] it has been accepted by one country with restrictions on the carriage of traffic other than that to or from the home country.[42] Thus, in all essential aspects of securing international commercial traffic rights, air transportation is dependent, as it was before the war, upon the conclusion of bilateral agreements. It is, therefore, necessary to take note of certain national policies which are not completely compatible with the fullest development of commercial aviation.

The gravest political threat to commercial aviation is that nationalism which seeks to secure a predetermined quota of international air travel, not by seeking to make its carriers efficient in international competition, but by imposing artificial restraints on the right of foreign air lines to carry certain categories of traffic, the quantum of service to be provided, or the rates to be charged. These policies are consistent only with a determination to use air transportation as an instrument of national policy irrespective of economic principles or commercial considerations.

The economic obstacles to the full development of air transportation are important for both domestic and international aviation. They may be classified under a variety of headings as—restraints of a cartel character, the impairment of incentives to service and patronage development, problems of financing and capital investment, oppressive taxation, and obstructive and uneconomic regulatory policies.

Restraints of a cartel character are an immediate danger in the international field,

[40] As of November 1, 1945, the following countries had accepted this agreement: Afghanistan, Australia, Belgium, Canada, Czechoslovakia, El Salvador, Ethiopia, Greece, India, Iraq, Liberia, Netherlands, New Zealand, Norway, Paraguay, Poland, Spain, Switzerland, Turkey, the United Kingdom, and the United States.

[41] As of November 1, 1945, the following countries had accepted this agreement: Afghanistan, China, El Salvador, Ethiopia, Liberia, Netherlands, Paraguay, United States.

[42] Turkey.

but they may not be ignored in domestic air transportation. In prewar Europe, commercial aviation operated subject to a system of private control which eliminated virtually all rate competition. In conjunction with meetings of the schedule committee of the International Air Transport Association (IATA), the representatives of the carriers maintained understandings or agreements as to the rates to be charged by their air lines. These agreements were further supported by a series of pooling arrangements governing most of the important European routes.

If air transportation is to attain its full potential, the industry must be free from restraints which prevent progressive operators from introducing new services, reducing rates in order to develop new markets, or increasing volume to achieve lower unit cost. A consideration of the control of rates by cartel agreement will illustrate the danger. Where rates are established by agreement among several operators, there is a virtual certainty that the rates will be high enough to permit the survival of even the high-cost operators. Even though more efficient operators may be deriving profits which are excessive for a common carrier enterprise, experience indicates that cartels seldom consent to rate reductions that would reduce immediate profits. Thus, the inefficient are protected and perpetuated in the industry, and the efficient and progressive are prevented from developing their full capacity to serve the public. Incentives to improve efficiency are dulled and incentives to develop the market, except on a cooperative basis by the cartel group, which is usually ineffective, are destroyed.

In the appraisal of such cartel practices, it must be remembered that aviation is, and must continue to be, a dynamic industry. It is, therefore, essential that the more progressive operators be free from all private restraints, that the efficient air lines have every opportunity to improve their operations, and that every reduction in cost be translated into rate reductions which will bring new strata of users into the air-transport market. A new service in a new market must even be priced at times below current costs in order to obtain the large-volume operations which will make possible substantial reductions in unit costs. In a truly competitive industry, there will almost always be a saving minority of progressive leaders who, by radical innovations in operations and bold reductions in prices, demonstrate to the majority that new peaks of prosperity for the entire industry lie in the creation of larger and more stable markets.[43]

[43] It may be noted that cartel restrictions seldom lead to large profits when there are *many* operators in the industry. Most operators are then unable to obtain optimum volume and lowest unit cost; prospective profits are dissipated in carrying operating and administrative overhead. Unless the cartel controls extend to all aspects of the business—the types of equipment used, the quantum of service offered, the nature of ancillary services (meals, stewards, free baggage, et cetera), and the solicitation of business—competition is directed into uneconomic channels which absorb carrier income but which are of no significant benefit to the users of the service. In fact, the competitive development of the market is incompatible with the fundamental raison d'être of cartels; in a highly developed cartel agreement all such manifestations of competition are rigidly eliminated. But if competition does exist, it takes the form of advertising, traffic solicitation, the provision of luxury equipment, the offering of "extras" in service, or the operation of more frequent schedules. Such competition increases costs; it may divert traffic from one carrier to another; it can scarcely increase the total volume of business significantly, for only rate reductions can do that. The net result is that costs are held well above competitive levels;

The absence of incentives to service and patronage development can be fatal to the promise of air transportation. Attention has already been directed to the very small percentage of public transportation provided by air carriers. A vast expansion in the amount of service provided, by new route extensions, by more frequent schedules, by the use of larger and faster planes, and by the offering of new types of service, must be accomplished if air transportation is to occupy its destined position in the national and international economy.

The incentives to service and patronage development are to be found primarily in vigorous competition. Competition is the foundation of that freedom of managerial decision which is basic if technical progress is to be exploited. Only the possibility of larger immediate profits will encourage monopolistic management to experiment with the promotional effects of rate reductions; however, in the presence of competition, no operator dare postpone the introduction of improved methods lest he fall behind in the competitive race.

Many developments could destroy the incentives to service and patronage development. The alliance of air carriers with, or their subordination to, interests having conflicting allegiances could do so. If air transport enterprises were merely departments in integrated transportation corporations operating rail, highway and air services, the large committed investment in these other forms of transport would certainly create incentives to suppress rather than encourage the development of air transportation. If individual air-transport companies become too large and too complex, the managerial caution of the overgrown enterprise will largely destroy the incentives and the willingness to take risks which are essential to progress. Likewise, if the industry becomes overcapitalized or overburdened with fixed charges, the incentives to develop are impaired by considerations of caution and the necessity of avoiding risks. If regulations should seek rigidly and immediately to balance all increases in efficiency profits with rate reductions, incentives would be impaired. It should be recognized that free competition operates at both ends of the scale, that the necessity of avoiding losses is quite as impelling a motive as the desire for large profits, and that competitive pressures combined with the opportunity for profit provide the most effective incentives for service and patronage development.[44]

Unsound developments in the financing of air carriers or in their capital structures could easily blight the promise of the air-transport industry. For many years, capital requirements will remain large, not only to provide for the expansion of

rates and charges are held at monopoly level; profits are held at *competitive rates* but the total *amount* of profit is usually substantially less than would be realized in the absence of cartel restriction on rates. The users of the service and the investors are both the losers. The only way *some* investors can profit is through the elimination of other investors by the liquidation of some of the operators.

[44] It may be noted that the incentives to develop service and to attain maximum efficiency in operation may be undermined in the presence of government operation or where the government undertakes to provide the capital for the enterprise. Also the adoption of the so-called "chosen instrument" policy, granting a monopoly or a series of monopolies to non-competitive national airlines, has not been associated with the most vigorous development of air transportation in those countries where it has been tried. These factors are certainly significant in understanding the eagerness with which European operators have embraced the cartel philosophy and entered into pooling arrangements.

service, extensively and intensively, but also to finance larger and more costly equipment. To assure an adequate supply of capital, the industry must avoid debt financing with its fixed charges and must continue to maintain a favorable relation between net investment and total capitalization. It must be recognized that transportation markets generally are sensitive to the business cycle and business depressions and that air transportation in particular, serving primarily a passenger market, and the high-priced luxury section of that market, will be peculiarly sensitive to general business depression.[45] Therefore, even contingent charges such as an accumulation of unpaid dividends on preferred stocks could have serious adverse effects on a carrier's ability to attract capital, and any substantial amount of fixed charges could precipitate bankruptcy. Therefore, air carriers, and especially international air carriers,[46] should adhere to a capital structure composed of a single class of common stock.

Air carriers operate under the jurisdiction of many governments, state and national. They are, therefore, subject to many taxing authorities and are continually exposed to multiple taxation. After an exhaustive study of the multiple taxation of interstate air commerce, the Civil Aeronautics Board reported to the Congress on April 3, 1945, recommending enactment of legislation to provide for the equitable allocation of the several tax bases among the states in which interstate air carriers do business.[47] The Board also reported that "taxation of aviation fuel by the States threatens to impede the development of air transportation," and recommended that steps should be taken "to protect interstate commerce from burdensome and discriminatory State aviation-fuel taxes." Multiple taxation can be even more oppressive and critical for international carriers, and here the adoption of an allocation procedure is hardly a feasible solution. Only by bilateral treaties, or a multilateral convention, granting reciprocal exemption from taxation for foreign air lines, making each international carrier taxable only in its home country, can international aviation be protected from multiple international taxation.

Government regulation can greatly advance the prospects of air transportation or it can adversely affect the realization by air transportation of its full service potential. Regulation should be positive, rather than negative, and should be based upon performance yardsticks or standards that will stimulate efficiency in management and economical operations. The chief dangers are twofold: (1) that regulation will fail to provide that measure of competition which will assure that each and every

[45] Air transportation has never experienced the full impact of a depression. Throughout the thirties, secular growth overshadowed cyclical influences. Moreover, the carriers could rely upon mail payments to keep them in operation. With the expansion of the industry, mail payments have become a progressively smaller proportion of earnings until most carriers have reached a size where no practicable increase in mail payments could offset the decline in commercial revenues attendant on a general depression.

[46] These considerations are doubly important in international operations: international operations are more costly than domestic, and international travel is more sensitive to general business depression; also many of the foreign competitors operate with government capital and can be indifferent as to whether or not anything more than operating cost is realized.

[47] C.A.B., MULTIPLE TAXATION OF AIR COMMERCE, H. Doc. 141, 76th Cong., 1st Sess. (1945).

operator will be under competitive pressures to achieve maximum efficiency in operation and that no operator will be in a position to rest secure in the exploitation of a monopoly market, and (2) that positive standards of performance will guide the regulatory authorities in disposing of the issues which come before them. A substantial measure of competition is essential because no external regulatory authority can by its unaided efforts assure maximum efficiency in operations; there is always an incalculable, perhaps insuperable, inertia which any management can oppose to unwelcome suggestions by a regulatory authority. The sanctions available to the regulatory authority—reducing rates, terminating certificates and the like—are often so drastic in their consequences, so adverse to the interest of the consuming public, that they can seldom be used. Normally, of course, the management of regulated industries willingly comply with suggestions and orders from the regulatory authority. If the regulatory authorities supply leadership and insight and if they develop and use performance yardsticks which objectively measure the attainments of the several regulated enterprises, it can be expected that the regulatory body will be an important factor in the achievements of the industry. However, even the availability of objective performance yardsticks and standards depends in large measure upon the existence of competing organizations operating under conditions sufficiently comparable to make the experience of one enterprise a yardstick for judging the performance of another. If there are also direct competitive incentives to improve service, to develop patronage, to reduce costs and rates, the public can be assured that regulation is an aid to the progress of the industry.

In summary, the future role of air transportation cannot be reduced to a blueprint or to a statistical chart. The possibilities of technical advances cannot even be foreseen, much less measured. The role of air transportation today will certainly not be its role ten years hence. Only by recognizing its inherent dynamic character, only by the preservation of economic and legal frameworks that are compatible with a growing and technically evolving industry, can the public be assured that air transportation will provide the public service of which it is capable.

POSSIBILITIES FOR LOWER AIRLINE COSTS

JOSEPH L. NICHOLSON*

With the close of the war, interest is quickened in commercial air transportation. The forecasting of passenger fares at rail rates has become widespread. Juan Trippe, President of Pan American World Airways System, stated, sometime ago, that his company could offer passenger fares to Latin America of 3½c a mile and cargo rates as low as 10c a ton mile when improved planes are available.[1] Other airline spokesmen have made similar statements.

However, improved planes, engines and fuels offer only a partial answer to the question of lower fares and rates. Lying beyond the control of the designer, yet important in the total cost of transporting passengers and cargo, are ground and indirect expenses.[1a] In fact, if planes flew at no cost at all, the fares promised by these optimistic prophets would fail in many instances to cover ground and indirect expenses. Even with the large volume of operation the average 1943 ground and indirect cost for 15 domestic airlines was 27.7 cents per ton-mile, or 64.1% of total operating costs. In the case of international "American Flag" lines, the ton-mile cost was over $1.00. Pan American Airways in November, 1945 proposed a fare of $275 between New York and London based on permission to fly four trips instead of two per week. This still would have left passenger fares about 10 cents a passenger-mile.

During the past five years direct costs per ton-mile for domestic airlines have been cut in half chiefly because of increased utilization, heavier loads per plane and reductions in depreciation charges. The per ton-mile ground and indirect expenses in the same period have only been reduced about 11%. From 1938 through 1943, there was a 7.8% increase in ground and indirect expenses for every 10% gain in revenue ton-miles. Unless overhead shows a tendency to decrease more rapidly than the increase in volume of business done, it is likely to wipe out all the economies of the proposed new planes.

A formula for determining the operation cost of new types of aircraft was developed in 1938. At that time overhead was about 80% of direct flying cost. Some aircraft manufacturing companies, in calculating the performance costs of their

* B.S. Econ., 1921, University of Pennsylvania. Consulting Economist, Philadelphia, Pa.; Lecturer, Aviation Economics, Temple University; contributor of articles on science and economics to periodicals.

[1] New York Times, August 8, 1944.

[1a] Operating expense categories as established by the Civil Aeronautics Board are as follows:

Aircraft Operating Expenses (direct)

Flying Operations	Flight Equipment Maintenance—direct
Depreciation—Flight Equipment	

Ground and Indirect Expenses

Ground Operations	Passenger Service
Ground Equipment Maintenance—direct	Traffic and Sales
Equipment Maintenance—indirect	Advertising and Publicity
Depreciation—Ground Equipment	General and Administrative

projected ships, have fallen into the error of still basing overhead at 80% of direct operating cost. As a matter of fact, direct operating costs and overhead do not maintain a fixed relationship as the following table shows:

1939-1943 CALENDAR YEAR TOTAL, GROUND AND INDIRECT COSTS[2]

	Direct Flying Actual	Direct Flying Per Ton Mile	Ground and Indirect Actual	Ground and Indirect Per Ton Mile
1939	$26,021,921	32.91¢	$24,513,239	31.01¢
1940	34,789,659	29.36	34,712,139	29.30
1941	43,931,956	28.07	44,103,940	28.18
1942	35,410,275	20.26	46,943,996	26.28
1943	33,324,946	15.51	59,507,624	27.71

In most businesses fixed charges per unit of production go down as volume increases but the airlines have experienced a rise in ground and indirect expenses almost as fast as tonnage volume.

INDEX OF TONNAGE VOLUME VS. GROUND AND INDIRECT COSTS
(1939 = 100)

	Tonnage Volume	Ground and Indirect Costs
1939	100.0	100.0
1940	149.9	141.6
1941	197.9	179.9
1942	221.1	191.5
1943	271.7	242.8

Between 1939 and 1943, despite the 172% increase in ton-miles performed, total ground and indirect expenses declined only 11% on a ton-mile basis. Such items as passenger service and general and administrative expenses actually increased. In contrast, direct operating expenses declined 53%.

COMPARATIVE AIRLINE OPERATING EXPENSES FOR CALENDAR YEARS 1939 AND 1943
(Showing per cent of increase or decrease in various categories of ground and indirect expense)

	1939 Cents Per Ton-Mile	1943 Cents Per Ton-Mile	Per Cent Decrease
Aircraft Operating Expenses	32.91	15.51	53
Ground and Indirect Expenses:			
Ground Operations	11.30	9.13	11
Ground Equipment Maintenance—Direct	.74	.67	9
Equipment Maintenance—Indirect	2.55	2.48	3
Passenger Service	2.32	3.17	27*
Traffic and Sales	5.06	4.32	14
Advertising and Publicity	2.78	2.05	26
General and Administrative	5.11	5.25	3*
Depreciation—Ground Equipment	1.15	.64	44
Total Ground and Indirect Expenses	31.01	27.71	11
Total Operating Expenses	63.92	43.22	32

* Increase.

[2] All tables and quoted statistics, for this and subsequent data in these pages, unless otherwise noted, are developed for the same 15 domestic airlines from C.A.B., ANNUAL AIRLINE STATISTICS, DOMESTIC

From 1939 to 1943 all business costs have risen, but in the case of airlines, indirect costs have actually increased 124.2 per cent as against 110.6 per cent in revenues. Such a jump in indirect costs would be understandable when high promotional and educational expenses are necessary to develop new business. Today, that situation for the airlines does not exist. Passengers are being turned away. Because overhead in this period of peak traffic has risen faster than revenues, its reduction is uncertain after the war when airlines are again seeking business. Will a continuation of past air carrier policies work toward high costs?

A policy contributing to high costs has been the addition of unprofitable stops and routes producing small revenue. It is natural for an airline to want to expand and many new stops have been installed with the hope of building up traffic. Still other stops or extensions have been inaugurated as defensive methods to prevent one airline from invading another's territory. However, where traffic does not exist, the initiation of new routes and stops has been costly.

The following table lists air mail routes showing continuous losses for the four fiscal years 1938-1941, despite the large proportion of revenue derived in most instances from air-mail payments:[3]

Line	Route	4-Year Total Revenues	Per Cent Mail	4-Year Total Losses	Points
American	A.M.21	$1,567,488.87	41.20	$ 221,934.09	Boston-Cleveland
Braniff	A.M.50	245,647.00	27.34	107,397.34	San Antonio-Corpus Christi
Inland	A.M.35	445,453.39	79.35	72,249.74	Huron-Cheyenne
Penn-Central	A.M.32	1,538,392.60	34.71	181,015.79	Detroit-Chicago-Milwaukee
Penn-Central	A.M.34	273,551.00	48.77	212,805.70	Washington-Buffalo
Penn-Central	Non-mail routes	215,740.58		323,793.93	
TWA	A.M.36	720,049.71	22.92	351,262.15	Dayton-Chicago
TWA	A.M.37	561,952.74	43.09	684,277.56	Winslow-San Francisco
TWA	Non-mail routes	2,373,576.19		791,677.62	
United	A.M.17	352,759.94	67.86	229,345.83	Cheyenne-Denver
United	A.M.57	231,583.26		239,163.26	Seattle-Vancouver (no mail revenues)
Western Air	A.M.19	1,482,527.08	73.07	172,559.93	Gt. Falls-Salt Lake City
	Total	$10,008,722.36		$3,587,482.94	

This four-year record indicates the difficulty of building up traffic between points where its does not already exist. Although these routes averaged a loss of about 21 cents per revenue-mile for the period and diverted earnings from surface carriers, airline prestige and political pressure makes their continuance almost a necessity.

Despite their experience with unprofitable routes, practically every airline is seeking extensions to numerous small cities or in directions where traffic flow is small. The applications before the C.A.B. for new route mileage on January 1, 1944, were practically double the existing railroad trackage. The airline, in considering expan-

CARRIERS CALENDAR YEARS 1938-1942 (1943). The calendar year of 1943 developed from C.A.B.'s monthly airline statistics. As a common denominator for volume all traffic has been converted to ton-miles. Each passenger and baggage equals 200 pounds.

[3] C.A.B., ANNUAL AIRLINE STATISTICS, FISCAL YEARS 1936-1941 (1942).

sion, might benefit from the history of railroad expansion when efforts were made to link every hamlet. The least profitable branch lines were the first to succumb to the competition of the automobile, truck and bus, and the amount of trackage abandoned is testimony to the danger of expanding to areas of low traffic density.

The economic sphere of air transportation is to provide rapid service between large cities hundreds of miles apart. As a consequence, airline profits are determined by an inter-relationship of speed, distance and most important of all, size of population served. In the scramble for new routes the airlines are forgetting that they cannot get profitable traffic at the bottom of the population barrel. Eighty-eight of the one hundred and ninety-two cities receiving passenger air service in September, 1940, accounted for only 6 per cent of the total passenger traffic. About 15 cities with a population between 10,000 and 20,000 averaged 5 passengers or less per day. Yet TWA, for example, has filed applications for new routes to serve 13 Ohio cities[4] in addition to the four already served, and in Illinois, 13 stops in addition to its single stop—Chicago. A recent study made by United Air Lines reveals that with 15-minute stops every 50 miles, feeder planes have an average speed little better than that of a private car or train. If stops are reduced to 5 minutes, the speed would average 60 m.p.h. or about 20 m.p.h. faster.[5]

In transportation economics local tariffs have always been much higher than through rates because terminal costs, physical and clerical, are a large part of the total cost for the short haul. If many of the routes proposed by the airlines go into operation, a lowering of airline rates will be impossible. These attempt to cobweb sparsely populated and closely located areas will encounter four major difficulties: (1) new cost levels will be started as a result of additional investment in facilities; (2) lower traffic density or the revenue ton-miles per route mile will be encountered; (3) numerous stops impair the benefit of speed; (4) frequent schedules of surface transportation will offset the speed advantage of the airplane if flights are infrequent.

In spite of the high cost of terminal charges, airline spokesmen have preached against a co-ordinated transportation system. Dr. John H. Frederick has stated: "Sales and advertising policy to sell cargo transportation services . . . should be completely divorced from the railroads and rail express."[6] This viewpoint overlooks the higher costs involved when the airlines take on the functions of other existing agencies. Furthermore, flying air cargo differs from flying passengers or mail in that two profits are required—one for the airline and one for the patron who pays the charges. Likewise, this viewpoint overlooks the fact that approximately 30 per cent of all air express is transported by rail in some part of the journey. The very fact that airports are so far from central city points is basic for co-ordinated air-surface transportation. For illustration, St. Louis airport is located 17 miles from the busi-

[4] TRANSCONTINENTAL & WESTERN AIR, INC., YOUR AIRLINE AND YOUR COMMUNITY (1944).

[5] (June 5, 1944) 1 AVIATION NEWS 37.

[6] Dr. John H. Frederick, address before Air Cargo meeting of the Society of Automotive Engineers, November 10, 1943, Chicago.

ness district, Los Angeles is 15 miles distant, with the national average between 7 and 8.

Instead of opposing co-operation which offers possibilities of bettering the national transportation system, airlines should recognize the value of it. In the final analysis, public convenience and necessity, not the airlines, should determine the type of transportation of greatest benefit. To attain a greater volume of traffic, enabling lower costs, some form of integration or co-ordination may be forced upon airlines by competition, just as it was on the railroads in adopting bus lines and door-to-door delivery of freight.

The high cost of airline operation has been abetted by governmental rate-making theories. Because transportation has been treated as a monopoly by governmental agencies, rates have been regulated by decree rather than by competition. Rates charged by railroads in the early stages of their development could make or break an industry or community because it was often wholly dependent upon railroad services and so government regulation of rates came into being. Today, communities and industries are competitively served not only by railroads but by public motor carriers, trucks and cars privately owned and, to a certain extent, the airplane and water carrier. We have outgrown the necessity or regulating rates.

Rate setting, based on a fair return on invested capital, has encouraged the larger fixed investments that are characteristic of publicly-regulated utilities and has resulted in a certain lack of cost-mindedness. This is evident in the government's inclusion of Depreciation of Flying Equipment as a direct cost in the "2780" report forms submitted by airlines to the C.A.B. If depreciation were properly classified in airline accounting the 1943 ground and indirect costs per ton-mile would be over 2 cents higher. Furthermore, if total overhead expenses in 1943 had been properly allocated to passenger-transportation, which gives rise to the greatest share of airline overhead, a fare-rate of at least 4 cents per passenger-mile would have been needed to meet this item of per passenger-mile expenses. This rate would have been necessary in spite of the highest volume of traffic ever carried and a load factor of 88 per cent. In 1940, with a load factor of 58 per cent, a fare of nearly 6 cents was needed to cover overhead.

Today, with the many optional methods of transportation available, rates should be regulated by competition, safeguarded by enforcement of the Sherman Anti-Trust Act. This is particularly true for air transportation where public regulation has gone beyond its requirements. Transportation is no longer a monopoly. A comparatively small investment is required to launch an air service or to extend one line into the territory served by another. Unlike the railroad, the airline maintains no rights-of-way, terminals or grade crossings. Yet the Civil Aeronautics Board is regulating rates for this new competitor in the transportation field in terms of the monopoly concept evolved many years ago by the Interstate Commerce Commission. By adjustments in the mail pay, the C.A.B. regulates the return on invested capital for airlines to approximately 8 per cent for domestic operations and 10 per cent for

foreign carriers. When airlines have shown increased earnings through efficient management, their mail rates have been cut. As a consequence, ground and indirect expenditures have risen with earnings.

In addition to the threat of governmental encroachment on the airlines in the immediate post-war period, there is the more distant danger of competition from the private airplane in both the passenger and cargo versions, whose effects on the air transport industry may resemble those of the motor vehicle on the railroad. Already former air force pilots, with surplus equipment, have started in business as taxi operators and contract carriers. Their lower direct and overhead costs give them a distinct competitive advantage over the airlines. These threats, both immediate and remote, provide a further need to constantly strive for lower costs and fares.

With the tapering off of the largest proportion of today's business, travel and mail generated by the services, airline operations will become increasingly high-cost as traffic approaches the saturation point for present fare and express rates. Studies of potential air express business show relatively small expansion occurring until present rates are cut in half. According to a recent study[7] prepared for the United Fresh Fruit and Vegetable Association, air carriers must reduce their rates to below 10 cents a ton-mile, which is about one-third the present overhead, if they are to develop any appreciative market for air-borne fruit and vegetables. This is less than one-sixth the basic rate for air express of 61.4 cents per ton-mile.

Economies are possible through the joint or co-operative operation of ground facilities. The sale of tickets, the handling of traffic, dispensing of weather information and the dispatching of planes could be operated jointly by two or more airlines, instead of separately 24 hours a day. After the initial effects of the invasion of one line into another's territory are over, consolidation of ground facilities might succeed the joint operation. C. R. Smith, Chairman of American Airlines, has even proposed[8] running planes like buses, say between New York and Chicago, within a few minutes apart so that the overflow of passengers from one company's flight would be cared for by the next flight of whatever it might be.

Luxury is the keynote of present air travel. Evidence of the importance some airlines place on service is a statement of Jack Frye,[9] President of Transcontinental & Western Airlines: "I am convinced that we cannot now, if ever, lower our standards of service. Quality service built up our business and is necessary to maintain customer loyalty." He went on to indicate that mass transportation by air was a matter of fifteen or more years. With the necessity of maintaining their load factor, especially as more and larger planes become available, the airlines will be forced to decide whether they are to stress a super-personalized service, or to attract the butcher, the baker and their families. When the airlines go after this type of business, lower

[7] Ralph E. Myers and Glenn F. Phillips, "Shipment of Perishables Made by Ralph E. Myers Co." (1945).

[8] C. R. Smith, *What We Need Is a Good Three-Cent Airline* (Oct. 20, 1945) SAT. EVE. POST.

[9] Address before the National Aviation Clinic, Oklahoma City, Nov, 19, 1945.

fares rather than chrome trimmings and the proposed cocktail bars will be the far more powerful inducement to travel. A type of operation more closely resembling the inter-city bus lines offers the possibility of lower fares through lower indirect costs. A comparison of 1943 figures for Southeastern Greyhound with those of three transcontinental airlines illustrates the bus line's operating economy:

DIRECT AND INDIRECT EXPENSES[10]
(in cents per passenger-mile)

	Direct	Indirect	Total
(a) Southeastern Greyhound[11]	.50	.43	.93
(b) 3 airlines—TWA, United and American	1.51	2.64	4.15

The indirect costs of bus line operation were only one-sixth those of the airlines. While it is not suggested that air and bus travel service are strictly comparable, the bus carriers' costs provide a goal toward which airlines could conceivably strive. Emphasis on price rather than on service has been the keynote of appeal to the masses, not only of bus transportation, but also of self-service markets, variety stores, cafeterias and tourist camps. Expansion in the commercial aviation field is a matter of national concern, particularly to the more than 2 million men associated with the operation of military aircraft and the 2¼ millions more engaged in manufacturing planes and accessories. From such a large group trained in the industry there is likely to arise political pressure to provide jobs through government subsidy or operation. Expanding industries have generally been associated with progressively lower costs. Adherence to this pattern will be necessary if air transportation is to achieve its place among major United States industries.

[10] Derived by converting mail, express and excess baggage pound miles flown into ton-miles and reconverting this total into passenger miles on the basis of 200 pounds per passenger and baggage.

[11] I.C.C. Docket 32783 (1943), Report to Interstate Commerce Commission.

FEDERAL, STATE AND LOCAL JURISDICTION OVER CIVIL AVIATION

CHARLES S. RHYNE*

INTRODUCTION

As civil aviation moves with amazing rapidity toward peacetime use of the many wartime achievements in the aviation field, one of the most important subjects is governmental jurisdiction over civil aviation. Leaders in the field of civil aviation are watching anxiously the legislative developments on Federal, state and local levels as "complete freedom of National and International trade and commerce depends entirely upon man-made laws."[1] That defects exist in present laws is readily apparent from the pending proposals to broaden Federal, state and local jurisdictions in the aviation field. On the Federal level, the McCarran[2] and Lea[3] Bills are a rather sweeping rewrite and expansion of Federal jurisdiction to plug the loopholes in existing laws which experience has demonstrated an urgent need for. There is also proposed legislation in the tort liability field[4] and the airport field.[5] On the state level, the current legislative campaigns to secure adoption of the Model State Aeronautics Department Act,[6] a Model State Airport Act, a Model State Airport Zoning Act,[7] and a Uniform State Air Carrier Bill[8] are evidence of a concerted drive to assert state jurisdiction over various phases of civil aviation. On the local level, there is intensive activity, chiefly in the airport and airport zoning fields, to adapt local legal powers and regulations to the "Air Age" which is upon us.

The purpose of this article is to examine the jurisdictions which the Federal, state and local governments have already asserted in the field of civil aviation rather than to discuss in detail the merits of suggested changes which these pending legislative proposals would effect.

* LL.B., 1937, George Washington University. National Chairman, Junior Bar Conference and member of Section of International and Comparative Law of the American Bar Association. Author: CIVIL AERONAUTICS ACT ANNOTATED (1939); AIRPORTS AND THE COURTS (1944). Contributor of articles on Aviation Law to legal publications. Member of the Washington, D. C., Bar.

[1] L. Welch Pogue, Chairman, Civil Aeronautics Board in "Aviation as a Law Moulding Force," an address delivered Nov., 1942, before the Nebraska State Bar Association, printed in 21 NEB. L. REV. (Proceedings Section, Dec. 1942 issue) 53, 55.

[2] S. 1, 79th Cong., 1st Sess. (1945).

[3] H. R. 674, 79th Cong., 1st Sess. (1945).

[4] H. R. 532, 79th Cong., 1st Sess. (1945).

[5] S. 2, 79th Cong., 1st Sess. and H. R. 3615, 79th Cong., 1st Sess. (1945). This legislation has been passed by both the House and Senate and is pending before a Conference Committee as of this writing.

[6] See discussion of this Bill *infra* in the consideration of state safety jurisdiction and Steers, *The Development of State Aviation Agencies* (1945) 18 STATE GOVERNMENT 8.

[7] See discussion of these two acts *infra* under the consideration of state and local jurisdiction.

[8] See discussion of this Bill *infra* under the section on state economic jurisdiction.

I. FEDERAL JURISDICTION

(A) *Sources and Scope*

Federal legislation in the aviation field took the form of appropriations for air mail service[9] up until the adoption of the Air Commerce Act of 1926.[10] By this Act, jurisdiction was assumed over safety matters in the field of civil aviation. These covered examination and licensing of pilots and mechanics, registering and licensing of airplanes, issuance of certificates of airworthiness for airplanes, inspection of aircraft, air traffic rules and rating of airports.[11]

The Congress had amended the Air Commerce Act slightly[12] and adopted more air mail legislation, with some of the latter containing various economic regulations applicable to air mail carriers,[13] before 1938 when it adopted the Civil Aeronautics Act[14] to supersede all the air mail legislation and most of the Air Commerce Act.[15]

The jurisdiction asserted by the Federal Government over aviation in the Civil Aeronautics Act of 1938 is twofold in its coverage. First, the Act provides for the regulation of certain economic aspects[16] of air services, such as the issuance of certificates of public convenience and necessity, the supervision of rates, consolidations of air services, and interlocking relationships. In other words, the economic regulatory aspects of the Civil Aeronautics Act of 1938 deal with governmental control and supervision over the business activities of air transportation. The safety regulations[17] provided for in the Act are concerned with such measures as the airworthiness of airplanes, the competency of airmen, safety at airports, and control over airplanes while engaging in flight. The Act also gives the President, the Secretary

[9] The Air Mail Act of 1925, 43 STAT. 805 (1925) 39 U. S. C. §461 (1928). See DAVID, THE ECONOMICS OF AIR MAIL TRANSPORTATION (1934) 8, and RHYNE, CIVIL AERONAUTICS ACT ANNOTATED (1939) 14-19, for reference to appropriations for army carriage of the mail before civil aviation took over this task in 1925.

[10] 44 STAT. 568 (1926) 49 U. S. C. §171 (1928). See LEE, LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926 (1928), where the author discusses or includes the following: (1) The text of the Air Commerce Act of 1926, the Committee reports and other material relating to its legislative history; (2) articles and reports, together with two unpublished court decisions, relating to legal problems presented by civil air navigation; (3) materials relating to state legislation upon civil air navigation, including the text of the Uniform State Aeronautics Law and a digest of State regulatory legislation; (4) the text of the two international conventions relating to civil air navigation, which the United States has signed but not ratified.

[11] See 1928 U. S. AV. R. 365-431 for the full text of the first Air Commerce Regulations issued under the Air Commerce Act of 1926.

[12] 45 STAT. 1404 (1929), 48 STAT. 933 (1934), 49 U. S. C. §171 (1934). Also *The Air Commerce Act of 1926—Amendments of 1934* (1934) 5 AIR L. REV. 346-350; SCHMECKEBIER, THE AERONAUTICS BRANCH, DEPARTMENT OF COMMERCE: ITS HISTORY, ACTIVITIES AND ORGANIZATION (1930); Williams, *Federal Legislation Concerning Civil Aeronautics* (1928) 78 U. OF PA. L. REV. 798.

[13] See SPENCER, AIR MAIL PAYMENT AND THE GOVERNMENT (1941) 40-100; GOODMAN, GOVERNMENT POLICY TOWARD COMMERCIAL AVIATION (1944) DAVID, *supra* note 9, and RHYNE, *supra* note 9, at 24-36.

[14] 52 STAT. 973 (1938), 49 U. S. C. §401 (1940).

[15] See RHYNE, *supra* note 9.

[16] Title IV, secs. 401 to 416 of the Act, 49 U. S. C. §§481-495 (1940). See also the Economic Regulations issued pursuant to the Act by the Civil Aeronautics Board.

[17] Title VI, secs. 601 to 610 of the Act, 49 U. S. C. §§551-560 (1940). See also the Civil Air Regulations issued pursuant to the Act by the Civil Aeronautics Board. 14 CODE FED. REGS. (CUM. SUPP.) §01 *et seq.*

of State, and the Civil Aeronautics Board jurisdiction over international aviation matters.[18]

That Congress envisoned aviation as a matter that is international and national in scope is indicated by the Congressional direction to the Board (Authority)[18a] to consider as "being in the public interests and in accordance with the public convenience and necessity," the following:

"The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."[19]

The Civil Aeronautics Act was passed under the Commerce Clause of the Federal Constitution after various other Federal Constitutional powers had been considered.[20]

In an early study, the Federal Aviation Commission had recommended the adoption of a constitutional amendment giving to the Federal Government exclusive control over all phases of civil aeronautics within the United States, if the states did not adopt uniform regulatory laws within a reasonable length of time.[21] In 1919, by formal treaty, all nations were declared to own the space over the lands within their respective borders,[22] and some writers had suggested that the Federal Government gain exclusive control over aeronautics by use of the treaty powers.[23] This would be done by invocation of the doctrine of the famous case of *Missouri v. Holland*.[24] In that case, the Supreme Court of the United States held that when the Federal Government made a treaty with Canada as to migratory birds, such treaty superseded all state legislation in conflict therewith. The District Courts had

[18] See Rhyne, *Legal Rules for International Aviation* (1945) 31 VA. L. REV. 267, at 286 *et seq.*

[18a] The title was changed from Civil Aeronautics Authority to Civil Aeronautics Board by Presidential Reorganization Plan No. IV in 1940. See SECOND ANNUAL REPORT OF THE CIVIL AERONAUTICS AUTHORITY (1940) 57-60.

[19] Sec. 2(a) of the Act, 49 U. S. C. §402(a) (1940).

[20] "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes"; Art. 1, Sec. 8, Cl. 3. See Gibbons v. Ogden, 9 Wheat. (U. S.) 1 (1824) (supremacy of power of Congress to regulate interstate commerce); Minnesota Rate Cases, 230 U. S. 352, 399-400 (1913); United States v. Carolene Products Co., 304 U. S. 144 (1938) (extent of power of the Congress to regulate interstate commerce).

[21] REPORT OF THE FEDERAL AVIATION COMMISSION, SEN. DOC. No. 15, 74th Cong., 1st Sess. (Jan. 30, 1935) 237-238.

[22] *Hearings before the Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652*, 75th Cong., 1st Sess. (March-April, 1937) 87-89, 250, 256. (The International Convention on Aerial Navigation held in Paris in 1919.)

[23] BOGERT, PROBLEMS IN AVIATION LAW (1921) 306; Greer, *Aviation from a Legal Point of View* (1929) 15 A. B. A. J. 308; Logan, *Recent Developments in Aeronautical Law* (1934) 5 J. OF AIR L. 548, 563; Note (1934) 5 AIR L. REV. 346, 347. See also Wigmore, *Did the Federal Government Acquire Exclusive Aerial Jurisdiction Two Years Ago* (1933) 4 J. OF AIR L. 232-235. He states: "In the Pan-American Convention on Commercial Aviation, signed at Habana on February 20, 1928, and ratified by the President March 6, 1931, occurs the following innocent-looking sentence (article 32): 'The contracting States shall procure as far as possible uniformity of laws and regulations governing aerial navigation.'" Dean Wigmore raises the query whether under the case of Missouri v. Holland, 252 U. S. 416 (1920) the above treaty could not enable the Federal Government to acquire exclusive aerial jurisdiction. Also see McCormick, *Exclusive Federal Jurisdiction Over Aviation via International Treaties* (1935) 6 AIR L. REV. 13-33.

[24] 252 U. S. 416 (1920).

previously held that the Federal Government could not control migratory birds by a Federal statute passed under the Commerce Clause.[25]

Use of the admiralty power had also been suggested as a basis for Federal regulation of civil aeronautics.[26] The "Air Commerce Act of 1926" was patterned upon the water navigation laws, but its regulatory power is based upon the power to regulate interstate commerce.[27]

While Federal aviation statutes are based upon the Commerce Clause,[28] the extent to which the Congress has asserted Federal jurisdiction over civil aviation depends upon the terms of the legislation which it has adopted. This legislation is examined in the next two sections.

(B) *Safety Jurisdiction*

The extent of Federal jurisdiction over safety factors is based on the definition of "air commerce" which, according to the Civil Aeronautics Act of 1938 includes:[29]

1. Interstate, overseas, and foreign air commerce;
2. The transportation of mail by aircraft;
3. Any operation or navigation of aircraft within the limits of any civil airway;
4. Any operation or navigation of aircraft which directly affects interstate, overseas, or foreign air commerce; and
5. Any operation or navigation of aircraft which *may endanger safety* in interstate, overseas, or foreign air commerce.

It must be emphasized that the latter two provisions grant to the Federal agency the power to regulate any flying which may affect or endanger safety in interstate commerce, whether such flight be of an interstate or an intrastate character. It should be further noted that the interstate flight to be protected may be within or without the system of Federal civil airways. It is difficult even to imagine any flight that is not at least a potential menace to interstate flight when one considers the hundreds of thousands of miles in interstate commerce flown annually by the scheduled commercial airlines alone.

Under this broad definition of "air commerce" the Board promulgated regulations requiring a Federal license for *all* aircraft[30] and *all* airmen[31] regardless of

[25] United States v. Shauver, 214 Fed. 154 (E. D. Ark. 1914); United States v. McCullagh, 221 Fed. 288 (D. Kan. 1915).

[26] See LEE, *op. cit. supra* note 10; Bogert, *op. cit. supra* note 23, at 304; Ewing, "Right of Flight" (speech delivered at Law School of University of Alabama, 1931, published in 1932 in pamphlet form). H. R. 14601, 71st Cong. (May 13, 1930) was an aircraft regulation bill based on this power. Knauth, *Aviation and Admiralty* (1935) 6 AIR L. REV. 226; Notes: (1934) 5 AIR L. REV. 346-350; (1914) 28 HARV. L. REV. 200; (1915) 3 CAL. L. REV. 143-144. *Report of the Committee on Jurisprudence and Law Reform of the American Bar Association, Proposed Federal Air Act* (1911) 36 A. B. A. J. 379-386. Veeder, *The Legal Relation Between Aviation and Admiralty* (1931) 2 AIR. L. REV. 29.

[27] See LEE, *op. cit. supra* note 10.

[28] See *supra* note 20.

[29] Sec. 1(3) of the Act, 49 U. S. C. §401(3) (1940).

[30] Sec. 610(a) (1) of the Act, 49 U. S. C. §560 (1940), implemented by the Civil Air Regulations, 14 CODE FED. REGS. (CUM. SUPP.) §60.31.

[31] Sec. 610(a) (1) of the Act, 49 U. S. C. §560, implemented by §60.30 of the Civil Air Regulations, 14 CODE FED. REGS. (CUM. SUPP.) §60.30.

whether either or both are engaged in interstate or intrastate commerce, regardless of whether the flight is of a commercial or non-commercial nature, and regardless of whether the flight takes place on or traverses a civil airway. In other words, any airman or aircraft engaged in flying of any sort in the airspace overlying the United States is required pursuant to the Safety Regulations to have a Federal license.

In the only two cases thus far challenging the extensiveness of this exercise of Federal power, the Federal Courts have sustained the regulations, upholding their application to: (1) an aircraft flying purely intrastate within a Federally designated civil airway and having no Federal certificate of airworthiness although having one issued by the state;[32] (2) an operator who, having no Federal pilot's certificate (as well as disregarding certain other provisions of the Federal regulations) made two non-scheduled off-the-airways flights, one such flight being wholly within one state.[33] In the latter case, the *Drumm* case,[34] the operator was penalized for violation of the regulations even on his intrastate flight. In the former case, the *Rosenhan* case,[35] the court made the point that Congress did not limit the question of safety to a manifestation of actual danger; rather, it could and did exert its power to eliminate all *potential* elements of danger.

An important question in the problem of Federal-State Jurisdiction which is directly related to the issue decided in the *Drumm* case is whether the assertion of power by Congress over an area of intrastate commerce deprives the states of power to regulate the same subject or closely related subjects. Whether the assertion of Federal power over all aircraft and airmen flying in any part of the airspace of the United States prevents the states from exerting any control over the same factors was not in issue in the *Drumm* case and has not, therefore, been judicially determined. It is quite possible that a decision on this question may not be forthcoming for a number of years in view of the fact that the tendency of state law with respect to such safety factors has been to follow the Federal licensing requirements. Most states require a Federal license for aircraft and airmen. A great many of the state laws merely provide that the Federal license be registered with some agency of the state. A few states require both a Federal and a state license and in most of these instances, the state license is, in effect a certificate of registration or "recordation" of the Federal license. Other states require either a Federal or a state license and in only four states is a state license alone sufficient to engage in intrastate flights.[36] These state laws are examined later herein in detail in discussing state safety jurisdiction.

There is a substantial body of precedent of long standing to be found in Supreme Court decisions to the following effect: Congress may regulate intrastate commerce in order to regulate interstate commerce, even to the exclusion of a state's power to

[32] Rosenhan v. United States, 131 F. (2d) 932 (C. C. A. 10th, 1942).
[33] United States v. Drumm, 55 F. Supp. (D. Nev. 1944) 151.
[34] *Ibid.*
[35] *Supra* note 32.
[36] See WATERMAN, THE ROLE OF THE STATES IN POSTWAR AVIATION (Bur. of Pub. Administration, Univ. of Cal, 1945) 48-50.

legislate concerning commerce within the state's boundaries where (1) the regulation of such intrastate commerce is necessary in order to regulate effectively interstate commerce; and (2) where Congress manifests a clear intent to regulate the subject matter to the exclusion of the state or where the state and Federal Regulations cannot both be given effect because ot repugnancy.[37]

The *Drumm*[38] case indicates that the Federal government has power to regulate the licensing of airmen or aircraft engaged in intrastate flight.

While there is no express prohibition in the Civil Aeronautics Act forbidding state regulation of safety matters, it is possible that the extremely broad powers asserted over such matters by Congress might be interpreted by the Supreme Court as indicative of Congressional intent to occupy the field exclusively.[39] An examination of the criteria which has been accepted by the Supreme Court in the past as sufficient to indicate such intent is a problem in constitutional law beyond the scope of this article.

With respect to safety regulations, all authorities agree that uniformity of regulation is not only desirable but absolutely essential to the public welfare. Exclusive regulation by the Federal government obviously would assure such uniformity. Even the most rabid defenders of states' rights admit that variations of any proportion in state safety regulations could serve only to impede aviation progress. Such authorities propose, therefore, uniform supplementary legislation on the part of each of the states, and these proposals are examined later herein in discussing state jurisdiction. These so-called "Uniform Laws," it must be admitted, are well known for their lack of uniformity.[40] In 1939, the Committee on Aviation of the American Bar Association withdrew its approval of a Uniform State Regulatory Act because of doubt that uniformity could ever secure by means of such statutes.[41] Even granting the advocates of uniform legislation by the states the unwarranted assumption that all of the forty-eight states would pass an identical statute,[42] there is no way to insure uniformity of interpretation by the courts or the state aviation agency, nor to insure unformity in the regulations issued under such statutes.

The most useful function the state could serve with respect to safety matters would be that of assisting the Federal government in the enforcement of the Civil Air Regulations if such a function is within the police powers of the states. This point is again referred to in considering state safety jurisdiction *infra* where some of the legal problems raised by such assistance are discussed.

(C) *Economic Jurisdiction*

While the constitutional power of Congress over interstate and foreign commerce is just as broad with respect to economic regulatory jurisdiction as it is to safety

[37] Savage v. Jones, 225 U. S. 501, 533 (1912); International Shoe Co. v. Pinkus, 278 U. S. 261, 265 (1928); Hines v. Davidowitz, 312 U. S. 52 (1941). See Ryan, *Economic Regulation of Air Commerce by the States* (1945) 31 VA. L. REV. 479, 490-502.

[38] *Supra*, note 33.

[39] But cf. Kelly v. Washington, 302 U. S. 1 (1937).

[40] Ryan, *op. cit. supra* note 37, at 529.

[41] 64 A. B. A. R. 170 (1939).

[42] See the comments on uniform statutes in Ryan, *op. cit. supra* note 37, at 529-530.

regulatory jurisdiction, Congress did not see fit in passing the Civil Aeronautics Act to exercise the commerce power as comprehensively with respect to Federal economic regulation as it did with respect to Federal safety regulation. As has been stated above, *all* aircraft and *all* airmen are subject to the safety requirements. No parallel provision is made in the so-called "economic" sections of the Act. Rather, the Act applies its economic sections only to carriers engaged in *air transportation,* which term, by a series of definitions in the Act,[43] means the carriage by aircraft of persons or property as a *common carrier*[44] for compensation or hire or the *carriage of mail* in interstate commerce. Consequently, the economic regulations promulgated by the Board do not extend to *private* and *contract* carriers by aircraft, regardless of whether or not such carriers engage in interstate, overseas or foreign commerce. That Congress has power to regulate *any* carrier, whether common or private, engaging in interstate commerce admits of no doubt; why Congress excluded private and contract carriers from the terms of the Act poses an interesting, if speculative, problem.[45]

Another section of the Act[46] provides in part that "no air carriers shall engage in any air transportation unless there is in force a certificate issued by the Authority (Board) authorizing such air carrier to engage in such air transportation. . . ." Other sections of the Act provide that the Board shall issue a certificate of public convenience and necessity if it finds that an applicant is fit, willing, and able to perform such transportation properly and if it finds that such transportation is required by the public convenience and necessity.[47] Under the statute the Board was given power to classify common carriers by aircraft for purposes of economic regulation and to prescribe the character and degree of regulation and to exempt from such regulation in the public interest to avoid undue burden.[48] In 1938, the Board issued an exemption order which provided for the exemption of non-scheduled common

[43] Sec. 1(10) and (21)(a) of the Act, 49 U. S. C. (1940) §401(10) and (21)(a).

[44] Cases holding particular air carriers to be common carriers are: Curtiss-Wright Flying Service, Inc. v. Glose, 66 F. (2d) 710 (C. C. A. 3d, 1933), *cert. den.* 290 U. S. 696; Ziser v. Colonial Western Airways, Inc., 10 N. J. M. 1118, 162 Atl. 591 (1932); Hagymasi v. Colonial Western Airways, Inc., 1931 U. S. Av. R. 73 (N. J. Sup. Ct. 1931) affirmed 10 N. J. Misc. 1118, 162 Atl. 591 (1932). Bolle v. Colonial Western Airways, Inc., 110 N. J. L. 46, 164 Atl. 436 (1932); Smith v. O'Donnell, 215 Cal. 714, 5 P. (2d) 690, 12 Pac. (2d) 933 (1932); Turgeon v. Quebec Airways, Ltd., 1942 U. S. Av. R. 201(Super. Ct. Quebec, 1942); Conklin v. Canadian Colonial Airways, Inc., 1934, U. S. Av. R. 21 (N. Y. Sup. Ct. N. Y. Co., 1933), as affirmed 266 N. Y. 244, 194 N. E. 692; Law v. Transcontinental Air Transportation, Inc., 1931 U. S. Av. R. 205 (U. S. E. D. Pa., 1931); McCusker v. Curtiss-Wright Flying Service, Inc., 269 Ill. App. 502 (1933). Cases holding particular air carriers not to be common carriers are: Bird v. Louer, 272 Ill. App. 552 (1933); Seaman v. Curtiss Flying Service, Inc., 1929 U. S. Av. R. 48 (N. Y. Sup. Ct. Suffolk Co., 1929), reversed on other grounds, 231 App. Div. 867, 247 N. Y. S. 251; North American Accident Insurance Co. v. Pitts, 213 Ala. 102, 104 So. 21 (1928); Brown v. Pacific Mutual Life Insurance Co., 8 F. (2d) 996 (C. C. A. 5th, 1925).

[45] One can speculate on the intent of Congress in inserting the proviso: "That the Authority (Board) may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest." For details of this relief, see Neal, *The Status of Non-Scheduled Operations under the Civil Aeronautics Act of 1938, infra* this symposium, p. 508.

[46] Sec. 401(a) of the Act, 49 U. S. C. §481(a) (1940).

[47] *Id.* at (d) (1).

[48] Sec. 416(a) and (b) of the Act, 49 U. S. C. §496(a) and (b) (1940).

carriers from certain requirements of the economic regulations.[49] Consequently, only common carriers operating scheduled services in air transportation, as defined by the Act, have thus far been subject to the economic regulations of the Board, and only common carriers engaged in interstate, overseas, and foreign air transportation by aircraft are subject in any way to such economic regulations.

It has long been established that the power of Congress to regulate interstate commerce is plenary. It is equally well established that in regulating interstate commerce Congress may regulate intrastate activities which may burden or interfere with Federal control of interstate commerce. To what extent Congress, under the Civil Aeronautics Act of 1938, has exerted its power to regulate the economic activities of air carriers of an intrastate nature is as yet an unsettled question. The jurisdiction asserted by the Act over safety matters is extremely broad; it specifically includes "any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which *directly affects,* or which may endanger safety in, interstate, overseas, or foreign air commerce."[50] By limiting economic jurisdiction to interstate, overseas and foreign air carriers who are "common carriers" the Congress in the Civil Aeronautics Act certainly did not write into the Act the specific ideas of broad jurisdiction which are included in the safety provisions just quoted. The jurisdiction of the Civil Aeronautics Board over intrastate economic operations would, therefore, seem to depend on the extent to which particular cases of intrastate air commerce are related to interstate air commerce.[51]

While intrastate air transportation in the United States in principle remains under state control, like all borderlines the line between Federal and state jurisdiction over intrastate air transportation is difficult to draw.[52] It is possible that intrastate airlines transporting passengers or property, which may be considered as being in the stream of interstate or foreign commerce, can be subjected to Federal jurisdiction. At least with respect to the Federal requirement of the certificate of convenience and necessity, a Federal District Court has so held, in the *Canadian Colonial Airways* case.[53] (The carrier voluntarily discontinued the service between New York City and Niagara Falls, New York, and a consent decree was entered permanently enjoining the carrier from operating such a service without having been certificated by the Civil Aeronautics Board.[53a]) This is the only instance in which the power of the Federal government to regulate a physically intrastate air operation has been before the courts. The implications of this decision are far-reaching, for it is diffi-

[49] 14 CODE FED. REGS. (CUM. SUPP.) §292.1.

[50] Sec. 1(3) of the Act, 49 U. S. C. §401(3) (1940).

[51] The term "air commerce" is used in its technical sense in the treatment of safety regulation, that is, with the meaning given the term by definition in Sec. 1(3) of the Act, 49 U. S. C. §401(3) (1940). But in that part of the Act dealing with economic regulations, "commerce" or "air commerce" is used in its ordinary legal sense.

[52] See Ryan, *op. cit. supra* note 37; Willebrandt, *Federal Control of Air Commerce* (1940) 11 J. OF AIR L. AND COMM. 204; Morris, *State Control of Aeronautics* (1940) 11 *id.* 320; Taylor, *A Practical Reconciliation of State and Federal Control* (1941) 12 *id.* 232.

[53] C. A. B. v. Canadian Colonial Airways, 41 F. Supp. 1006 (S. D. N. Y. 1940).

[53a] ANNUAL REPORT OF THE CIVIL AERONAUTICS BOARD (1941) 36.

cult to imagine an air service of any magnitude which would not in some way "affect" interstate commerce even though such service be operated entirely within the boundaries of a single state. Such intrastate operations may parallel, compete or connect with an interstate air carrier in such a way as to affect interstate air transportation by diverting traffic, or by "supplying" passengers and cargo to an interstate carrier (the so-called "feeder" airline operation). Since air transportation is primarily a long distance operation rather than local in scope, it is unlikely that any air service though operated within the boundaries of a single state could long survive without depending to a greater or lesser degree on an aviation market which traverses state lines.[54]

The jurisdiction asserted by the Federal government in the economic regulatory field seems comparatively limited not only by the narrow definition given the term "air transportation" but also due to the fact that there has been no attempt by the National Government to extend (except with respect to the Canadian Colonial operation just described) and thereby define more accurately its economic jurisdiction by means of the usual constitutional principles relating to the commerce power.

II. STATE JURISDICTION

(A) *Safety Regulation*

All of the states have legislation covering various phases of air safety regulation Forty states require that all aircraft and all pilots have a Federal license. Of the eight states[55] which have no such requirement, six require either a state or Federal license,[56] and two require only a state license for both aircraft and pilots.[57] Virginia requires both a state and Federal license for aircraft and pilots. Eleven states have adopted air traffic rules substantially identical with the Federal Air Traffic Rules,[58] twenty-three[59] have air traffic regulations which make no reference to the Federal rules but which are usually based in part upon them, and fourteen[60] have no provision on this subject.

It has been held that while a state may prescribe air traffic regulations for intrastate traffic,[61] a statute which fixes no criterion to be adhered to by the State Aviation Commission in establishing such regulations is invalid as it violates the fundamental

[54] See Ryan, *op. cit. supra*, note 37, at 518-522, 506 for an economic analysis of intrastate air transportation and the articles cited *supra* note 52.

[55] The states which do not have this requirement are: Alabama, Connecticut, Maryland, Minnesota, New Jersey, North Dakota, Oregon, and Utah.

[56] Maryland, Minnesota, New Jersey, North Dakota, Oregon, and Utah.

[57] Alabama and Connecticut.

[58] Kentucky, Maine, Montana, New Jersey, New Mexico, New York, Ohio, Rhode Island, South Dakota, Washington, and Wisconsin.

[59] Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, Oregon, Pennsylvania, Tennessee, Utah, Vermont, and Virginia.

[60] Colorado, Florida, Georgia, Indiana, Louisiana, Mississippi, Nebraska, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, West Virginia, and Wyoming.

[61] People v. Katz, 140 Misc. 46, 249 N. Y. Supp. 719 (1931); Parker v. Granger, 4 Cal. (2d) 668, 52 P. (2d) 226 (1935), *app. dism.* 298 U. S. 644 (1936); Erickson v. King, 218 Minn. 98, 15 N. W. (2d) 201 (1944).

principle of Constitutional law that an uncontrolled statutory delegation of legislative power is void.[62] Federal and state air traffic regulations govern when they conflict with local regulations governing the landing and take-off of airplanes at airports.[63]

Adoption by the states of the Federal Air Safety Regulations does create certain legal questions. One lower court has held invalid state legislation authorizing the state agency to conform to then or thereafter existing Federal regulations (Federal Traffic Rules for landing and taking off at airports);[64] another lower court has invalidated a state law forbidding operation of aircraft without a Federal aircraft and pilot license.[65] These courts viewed the legislation as an unconstitutional delegation of state legislative power to the Federal government. In the latter case, the court by dictum stated that it would not be an unwarranted delegation of the legislative authority of the state to prescribe by statute that standards of construction of airplanes and qualifications of pilots must conform to the requirements of the Federal government. Minnesota amended her statute to include such a provision.[66] It is noteworthy that the State Aeronautic Department Act which the National Association of State Aviation Officials approved in November, 1944, and which was proposed for adoption by the forty-four states holding legislative sessions in 1945 provides:

"All rules and regulations prescribed by the Commission under the authority of this Act shall be kept in conformity, as nearly as may be, with the then current Federal legislation governing aeronautics and the regulations duly promulgated thereunder and rules and standards issued from time to time pursuant thereto."[67]

A footnote to the text by the authors of this proposed Act explains that this provision has been drafted in this form to avoid constitutional objections of delegation of state legislative powers to the Federal government.[68] Insofar as the licensing of aircraft, airmen, and air flight instructors is concerned, this proposed Act "does no more than to require the registration of Federal licenses, permits, and certificates."[69]

[62] State v. Larson, 10 N. J. Misc. 384, 160 Atl. 556 (1932); cf. Schechter Corp. v. United State, 295 U. S. 495 (1935).

[63] Rinehart v. Woodward Flying Service, 122 W. Va. 392, 9 S. E. (2d) 521 (1940).

[64] State v. Larson, *supra* note 62.

[65] Neiman v. Brittin, 235 C. C. H. §2801, 1935 U. S. Av. R. 159 (Minn. Dist. Ct. Jan. 22, 1935).

[66] Minn. Laws of 1935, Chap. 358, Secs. 2 and 3, 1935 U. S. Av. R. 384. See *Report of American Bar Association Committee on Aeronautical Law*, 1929 U. S. Av. R. 315, 323, 330.

[67] Sec. 6, subdivision 4, of the proposed Act.

[68] This footnote states:

"The laws of a number of states use the language 'shall be consistent with and conform to the then current federal legislation,' etc., or its equivalent. The question arises as to the constitutionality of a state statute adopting federal legislation or rules which may be enacted or prescribed in the future, thus surrendering legislative power to the congress or a federal bureau. On the other hand, if legislation and regulations existing at the time of the enactment of the state statute were adopted by reference, no opportunity would be given for keeping step with new legislation and regulations. The suggested language, therefore, seems preferable, because such a provision is valid and should be preferred to the gesture of an invalid provision."

[69] Quoted from the explanatory footnote to Section 9 of the proposed Act. The full text of the footnote states:

"In drafting this proposed regulatory section it has been the aim to avoid interference with proper federal regulation and at the same time, in the interest of the public, to enable the states to enforce

This Act should be taken as representing present state official thinking on the jurisdiction states want to assume in safety matters in the aeronautical field, as state officials drafted and are now sponsoring this Act.

It is readily apparent that the states want to go as far as they can legally go in adopting Federal safety regulations so as to assure the maximum amount of uniformity. Whether the proposed Act avoids the charge of infringing upon a jurisdiction already asserted by the Federal government is a question yet to be decided. The analysis of Federal safety jurisdiction in the first part of this article leaves little doubt but what the scope of activity left to the states in this field is indeed narrow. To avoid legal challenge to state regulations which cover the same field as those adopted by the Federal government, it has been suggested that the Civil Aeronautics Act be amended to specifically authorize the states to enforce the Federal safety regulations. The Attorney General of Florida has already held that his state's traffic inspectors may enforce the Federal air traffic regulations which have been adopted by Florida, but the inspectors may make arrests only in conjunction with peace officers.[70] Another suggestion is that persons violating the Federal safety regulations may be proceeded against in the state courts so as to prevent the flooding of the Federal courts with air traffic cases.[71]

The chief current question is whether Federal safety jurisdiction already excludes all state jurisdiction in the field. As already stated in discussing Federal safety jurisdiction, the cases which have considered the extent of Federal jurisdiction have not considered this problem. It may well be that Federal jurisdiction in this field is so broad as to exclude state safety jurisdiction as the *Drumm* case[72] certainly indicates a tendency to go that far.

(B) *State Economic Jurisdiction*

Fifteen states have statutes containing economic regulations applicable to air transportation.[73] In general, these statutes require common carriers by air to obtain certificates of public convenience and necessity before operating in the state with the more recent statutes going farther and paralleling the economic regulations of the Civil Aeronautics Act of 1938. California prohibits ". . . transportation of passengers for hire . . . between fixed termini over a route entirely within this State unless such person holds a Federal certificate of authority."[74]

police regulations. In so far as the licensing of aircraft, airmen, and air flight instructors is concerned, it does no more than to require the registration of federal licenses, permits, or certificates. A sentence has been added to the ordinary provision to the effect that certificates of registration shall constitute licenses in order to avoid possible constitutional objections. As to air schools, instructors in ground subjects, and airports, it is felt that these are matters entirely within the jurisdiction of the state."

[70] Opinion of August 17, 1934, printed in full in 1935 U. S. Av. R. 117.

[71] See H. R. 3383, Sec. 4, 79th Cong., 1st Sess. (1945).

[72] United States v. Drumm, *supra* note 33.

[73] Alabama, Arizona, Arkansas, California, Colorado, Illinois, Nevada, New Mexico, North Dakota, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and Wyoming.

[74] Cal. Laws 1943, Ch. 868, 1943 U. S. Av. R. 230. See Wolcott, *Does the Jurisdiction of the California Railroad Commission Extend to Air Transportation?* (1945) 33 CAL. L. REV. 114; McKeage, *The California Railroad Commission Has Jurisdiction Over Intrastate Rates and Charges of Airlines* (1945) *id.* at 299.

Most of this state legislation predates the Civil Aeronautics Act of 1938 and little has been done by the states having these statutes to regulate air carriers.[75] In 1944, Virginia[76] enacted legislation to provide regulation of the economic affairs of intrastate air carriers and Rhode Island amended her law.[77] In 1945, Alabama,[78] Arkansas,[79] and Vermont,[80] adopted statutes of similar effect. The latter three statutes were based upon the so-called Uniform State Air Carrier Bill drafted in 1944 and sponsored by the National Association of Railroad and Utility Commissioners. This Bill proposes state control over intrastate air carriers and over intrastate business of interstate air carriers. The three states just named, however, deleted the provisions relating to control over intrastate business of interstate air carriers.

There has been no court litigation involving the economic regulation by states of air transportation, but some decisions of state commissions in passing on economic matters have been reported. While these decisions are rather old in terms of the history of air transportation—all except one of them pre-dates the Civil Aeronautics Act of 1938—they should be recorded here as of historical importance in considering state economic jurisdiction over civil aviation. An applicant before the Arizona Commission who refused to produce statistics as to its other operations was found to have failed to meet the burden of showing that public convenience and necessity required the service for which authorization was sought.[81] One who contracted to dust crops with insecticide by airplane is not a "common carrier" and was held not subject to the Arizona Commission's jurisdiction.[82] In choosing between rival applicants for service between the cities of Grand Junction and Denver, the Colorado Commission made a factual finding as to the carrier best able to meet needs of the public for air service and analyzed the principles which it must consider in making such a decision.[83] In another case, the Colorado Commission in 1930 granted an interstate air carrier a certificate of public convenience and necessity without proof of need for the service in view of the Commerce clause of the Federal Constitution.[84] The Illinois Commerce Commission granted an intrastate air carrier a certificate of public convenience and necessity after finding facts showing that the carrier was financially and technically able to conduct the proposed service.[85] In Massachusetts, although no law requires certificates of public convenience before air carriers began operations, it has been held that rates charged by common carriers by aircraft are

[75] See Davis, *State Regulation of Aircraft Common Carriers* (1930) 1 AIR L. REV., 47; Ryan, *op. cit. supra* note 37.

[76] Va. Laws 1944, Ch. 267.

[77] R. I. Laws 1944, H. B. No. 851.

[78] Governor's Act No. 269, Ala. Acts 1945, H. B. 302.

[79] Ark. Laws 1945, Act No. 252.

[80] Vt. Laws 1945, H. B. 189.

[81] Application of Century Pacific Lines, P. U. R. 1932 C, 388, 1932 U. S. Av. R. 190 (1932).

[82] Quick Aviation Co. v. C. J. Kleinman, 60 Ariz. 430, 138 P. (2d) 897 (1943).

[83] Pikes Peak Air Company v. U. S. Airways, Inc., P. U. R. 1930 E, 308, 1930 U. S. Av. R. 253 (1930).

[84] Application of U. S. Airways, Inc., P. U. R. 1928 E, 518, 1932 U. S. Av. R. 187 (1928).

[85] Application of Century Air Lines, *et al.*, 1932 U. S. Av. R. 197 (1931). See also Matter of Northwest Airways, Inc., 3 AIR L. REV. 384 (Ill. Comm. Comm. May 4, 1932). See Opinion of Attorney General of Illinois, 1944 U. S. Av. R. 46 (1944) holding that intrastate air carriers who are common carriers must obtain such a certificate before beginning operations within that state.

subject to regulation by the Department of Public Utilities.[86] In Nevada, the State Commission, in issuing certificates of public convenience and necessity to three air transport companies for service on call, provided that each should have, at its home airport, a preference or priority of two hours over the others.[87] In Pennsylvania, the State Public Service Commission in an early decision,[88] has outlined the general principles it would follow in granting certificates of public convenience and necessity to common carriers by air.

This review of all the reported decisions by the states on economic regulation of air carriers reveals how little attention the states have given to this subject. Undoubtedly, the adoption of the Civil Aeronautics Act of 1938 virtually eliminated most of the need for state legislation of this character. Since air transportation is primarily long distance or interstate in character, there appears to be little of value which state economic control can add to Federal economic regulation. Economic regulation by forty-eight states could well be such a burden as to stifle civil aviation by the multitude of varied regulations which these different regulating agencies would almost certainly promulgate.[89]

A further complication for state economic regulation of air carriers arises from the fact that in most states the economic regulation is exercised by the State Utility or Railroad Commission rather than the State Aeronautics Commission. Where separate Commissions exist, an undercover fight usually goes on between these two state agencies almost constantly over their respective jurisdictions and duties. It is to be noted that the present Model State Aeronautics Department Act covering state safety jurisdiction is sponsored by the State Aeronautics Commissions (National Association of State Aviation Officials), and that those Commissions are opposed, either openly or in fact, to the state economic jurisdiction provided in the Uniform State Air Carrier Bill sponosored by the National Association of Railroad and Utility Commissioners. Some contend that if state commissions charged with jurisdiction over surface carrier utilities are now given jurisdiction over air carriers they will favor surface carriers over air carriers and thereby retard the development of air transportation.

At the present time, the Federal government clearly has economic regulatory jurisdiction over all "common carriers" engaged in interstate, overseas and foreign air transportation. It is doubtful, however, that the power is conferred by the Civil Aeronautics Act on the Board to exert economic regulatory jurisdiction over all intrastate air transportation. To the extent that the Federal authority may not extend to the interstate economic aspect of intrastate transportation, it may not cover

[86] Opinion of Attorney General of Massachusetts, 1944 U. S. Av. R. 51 (1944).

[87] Application of Francis A. Riordan, *et al.*, P. U. R. 1928 D, 854, 1932 U. S. Av. R. 185 (1928).

[88] Application of Gettysburg Flying Service, Inc., 8 Pa. P. S. C. R. 787, P. U. R. 1928 B, 287, 1932 U. S. Av. R. 181 (1927). In Application of Battlefield Airways, Inc., 17 Pa. P. S. C. R. 410 (1928) an application for incorporation of an air transport corporation was denied on the ground that since one company already operated in the proposed area of service the creation of a second company would result in destructive competition.

[89] See Boren, *National and State Regulation of Civil Aeronautics* (1943) 89. CONG. REC. A 1840, and citations *infra*, note 103.

all operations of the interstate airlines. It is not certain that the services such airlines supply and the rates they charge for carriage between points within the boundaries of a single state are subject to Federal jurisdiction. The *Canadian Colonial Airways* proceeding, already referred to herein in discussing Federal economic jurisdiction, suggests, however, the possibility that the Federal government may have jurisdiction over the intrastate services and charges of an interstate airline.

In all other fields of public transportation where both the Federal and state governments have attempted regulation thereof, the courts have been called upon to determine the respective and relative areas of jurisdiction of the Federal and state governments.[90] Air transportation will be no exception.

In determining the validity of state statutes or regulations which may affect interstate commerce, the Supreme Court of the United States has evolved two tests involving separate sets of criteria for two types of situations. In the first situation the general rule is well stated in the leading case of *Cooley v. Board of Port Wardens*.[91] There the court first formulated its theory that where the inherent nature of the subject matter requires uniformity of treatment within all the states, the power of Congress to legislate with respect thereto is exclusive. This doctrine, known as the "Uniformity of Regulation" theory, has been affirmed repeatedly by the court.[92] So, if the subject matter is one requiring uniform regulation throughout the states, the power of Congress to regulate is exclusive; perhaps it would take a positive manifestation of Congressional intent permitting the states to regulate before state regulation would be upheld.[93] Whether aviation is classifiable as such a subject matter has never been decided by the court. It is, however, entirely conceivable that it might be so considered by analogy to the power asserted by Congress over navigable waters.[94] No clear formula has been evolved by the courts whereby it is ascertainable in advance of a decision whether or not a given subject matter admits of only uniform and therefore national legislation.

In the second type of situation, that is, where the inherent nature of the subject matter does not require uniformity, but rather admits of diversity of regulation, each state may legislate respecting such matters and regulation by the states will be valid until the Federal Government, through Congressional action, manifests an intent either expressly or by implication to occupy the entire field.[95] After Congress acts, the courts are then called upon to decide whether Federal and state laws respecting the same subject conflict because of repugnancy or inconsistency.[96] In *Oregon-*

[90] See Tarney, *Methods of Differentiating Interstate Transportation from Intrastate Transportation* (1938) 6 GEO. WASH. L. REV. 553.

[91] 12 How. (U. S.) 299 (1851).

[92] Mobile County v. Kimball, 102 U. S. 691 (1881); Missouri *ex rel.* Bartlett v. Kansas Natural Gas Co., 265 U. S. 298 (1931); Ashwander v. T. V. A., 297 U. S. 288 (1936); Houston R. C. v. United States, 234 U. S. 342 (1941).

[93] Cf. cases in foregoing footnote.

[94] Ashwander v. T. V. A., 297 U. S. 288, 328 (1936); United States v. Appalachian Power Co., 311 U. S. 377 (1940).

[95] Clark Distillery Co. v. Western Maryland R. Co., 242 U. S. 311 (1917); Minnesota Rate Cases, 230 U. S. 352 (1913).

[96] The Shreveport Rate Cases, 234 U. S. 342 (1914); Mapier v. Atlantic Coast Line R. R. Co., 272 U. S. 605 (1926).

Washington R. & N. Co. v. Washington the court stated ". . . there is a field in which the local interests of states touch so closely upon interstate commerce, that in the silence of Congress on the subject, the states may exercise their police powers. But when Congress has acted and occupied the field, the power of the states to act is prevented."[97]

It will be recalled that in a large measure the Federal government has occupied the safety field insofar as the Federal Civil Air Regulations are applicable to all aircraft and all airmen. Whether or not such occupation of the field excludes the states from imposing supplementary safety rules is not clear.[98] With respect to the economic regulatory field, however, it seems patent that Congress did not intend the Federal government to exercise the broad jurisdiction asserted in the safety field. The economic regulatory jurisdiction intended to be assumed by the Federal government is limited by the Act itself. In this situation, the extent to which the Civil Aeronautics Board can assert jurisdiction over the economic aspects of intrastate air transportation depends in large measure on the language of the Act as interpreted in legal precedents construing such language when used under the Commerce Clause of the Constitution. In this language and in these precedents will be found the answer as to where to draw the line between the jurisdiction which the Congress has asserted and the field of economic regulation left to the states.

It is well established that the commerce power extends to all activities which may "affect" interstate commerce.[99] To the extent that the effective regulation of interstate commerce involves the regulation of intrastate commerce—a field ordinarily reserved to the respective states—Congress may legislate[100] concerning such intrastate commerce, and may legislate to the exclusion of the states where its manifests a clear intention to occupy the field exclusively.[101] In the light of such interpretations of the Commerce Clause, the assertion by the Civil Aeronautics Board of jurisdiction over the intrastate operations of Canadian Colonial Airways, an interstate carrier, does not seem a usurpation of state power over intrastate commerce. Whether the Civil Aeronautics Board can assert jurisdiction over intrastate air transportation of intrastate air carriers on the grounds that the regulation of such transportation is essential to the effective regulation of interstate transportation will depend upon substantial factual findings by Congress to that effect. Ample precedent can be found by looking in other public utility fields, particularly as respects public carriers, both by railroad and by water vehicles.[102]

It is certain from this short survey that there is a most pressing need for Federal legislation to clarify Federal jurisdiction over economic phases of air transportation

[97] 270 U. S. 87 (1925). [98] Kelly v. Washington, 302 U. S. 1 (1937).

[99] M'Culloch v. Maryland, 4 Wheat. (U. S.) 316 (1819); United States v. Ferger, 250 U. S. 199 (1918); Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197 (1938); United States v. Darby, 312 U. S. 100 (1940); United States v. Wrightwood Dairy Co., 315 U. S. 110 (1942).

[100] Houston R. Co. v. United States, 297 U. S. 288 (1936).

[101] Hines v. Davidowitz, 312 U. S. 52 (1941); Wickard v. Filburn, 302 U. S. 1 (1937); Cloverleaf v. Patterson, 315 U. S. 148 (1942).

[102] See Tarney, *supra* note 90; Binzer, *Civil Aviation—The Relative Scope of Jurisdiction of the State and Federal Government* (1945) 33 Ky. L. J. 276.

It is also apparent that this Federal legislation could best take the form of asserting exclusive Federal jurisdiction. It seems inconceivable that the states should be allowed to impose the unreasonable burden of varieties of economic regulations on the air transportation industry.[103] Years of conflict and court litigation can be prevented by such legislation if adopted now before the states begin to assert jurisdiction in this field.

(C) *Airports—Airport Zoning*

All of the states have legislation authorizing their local political sub-divisions—usually cities—to acquire and operate airports.[104] Further and more detailed reference is made to this subject later on in discussing local jurisdiction.

Thirty-six states have legislation authorizing the promulgation of zoning regulations to control the height of structures erected in airport approach areas.[105] This type of legislation is also given more extended consideration in the next section herein on local jurisdiction.

(D) *Tort Liabilities*

Some states have asserted jurisdiction over aviation accident liabilities. Arkansas,[106] Georgia,[107] and Pennsylvania[108] have adopted statutes providing that an aircraft operator's liability to his passengers is governed by the rules applicable to torts on land. California[109] and South Carolina[110] have statutes restricting the right of guest passengers in airplanes to recover for injuries suffered, and a Maryland statute exempts operators engaged in interstate or foreign commerce from liability for injuries caused by faults of navigation, dangers of the air and acts of God when the aircraft has a proper crew and is airworthy.[111]

Section 5 of the "Uniform State Law for Aeronautics," which was prepared by a committee of the American Bar Association in conjunction with the National Conference of Commissioners on Uniform State Laws and approved by both organizations in 1922, imposes the rule of absolute liability for damages by aircraft to persons or property on land or water, unless the injury is caused in whole or in

[103] See McDonald and Kuhn, *The Ocean Air—State or Federal Regulation* (1945) 31 VA. L. REV. 363, 374; Ryan, *id.* at 522.

[104] See STATE LAWS RELATING TO AIRPORTS, AIRPORT ZONING, AIR NAVIGATION FACILITIES: IN FORCE JULY 1, 1944 (National Aeronautic Association 1944); WATERMAN, *op. cit. supra* note 36; and RHYNE, AIRPORTS AND THE COURTS (1944).

[105] See RHYNE, *id.* at 171 for a list of these acts adopted before 1945. In 1945 Delaware, North Dakota, Utah, Vermont, and Washington adopted new airport zoning acts. Florida, Illinois, Iowa, Nebraska, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, and Wisconsin, clarified or expanded acts which had already been adopted in those states.

[106] Ark. Laws 1941, Act 457, 1941 U. S. Av. R. 341 at 348.

[107] Ga. Laws 1933, Act 206, 1933 U. S. Av. R. 421 at 423.

[108] Pa. Laws 1933, Act 224, 1933 U. S. Av. R. 476 and 485.

[109] See discussion and interpretation of this provision in Whittemore v. Lockheed Corp., 51 Cal. App. (2d) 605, 125 P. (2d) 531 (1942) and further decisions in this case 149 P. (2d) 212, 151 P. (2d) 670 (1944).

[110] S. Car. Laws 1935, Act 42, 1935 U. S. Av. R. 421.

[111] Md. Laws 1931, Ch. 403, 1931 U. S. Av. R. 365.

part by the person injured.[112] This statute, where it is in effect, does import into the law of the particular state a different legal rule for injuries of this kind as compared with injuries caused by mid-air collisions, injuries aboard aircraft, and injuries to aircraft by other instrumentalities.

In four[113] of the twenty-three states[114] which have adopted this Uniform Statute on surface injuries, this section has been amended to remove the absolute liability provision and to base liability on the rules of torts on land. Two states make proof of injury to persons and property on the ground *prima facie* evidence of negligence.[115] In Missouri, this section was entirely eliminated when the Uniform Law was adopted,[116] and in Colorado[117] and Georgia[118] this section was not adopted when certain other provisions of the Uniform Law were enacted. The fourteen states,[119] and Hawaii, which have the absolute liability provision incorporated in their law should recognize the present status of aviation as an ordinary mode of travel by deleting this provision from their statutes.

Section 6 of the Uniform State Law for Aeronautics of 1922 provides: "The liability of the driver of one aircraft to the owner of another aircraft, or to aeronauts or passengers on either aircraft, for damage caused by collision on land or in the air, shall be determined by the rules of law applicable to torts on land."[120] Twenty states have adopted this section.[121] In cases involving collisions of airplanes on the ground, the courts of states which have not adopted this provision have held that the general common law rules governing liability for accidents on land will be applied in aviation cases.

Seventeen states[122] and Hawaii now have in force the provisions of Section 4

[112] 11 UNIF. LAWS ANN. (1938) §5, pp. 161-162; text is also found in 1928 U. S. Av. R. 472-476.

[113] Arizona (uses the word "Negligence" to reach this legal effect) Laws 1929, Ch. 38, 1929 U. S. Av. R. 403 at 406; Ark. Laws 1941, Act 457, 1941 U. S. Av. R. 341, 347; Idaho Laws 1931, Ch. 100, 1931 U. S. Av. R. 335; and Pa. Laws 1933, Act 224, 1933 U. S. Av. R. 476 at 484. See Kadylak v. O'Brien, 1941 U. S. Av. R. 9 (U. S. D. C. W. D. Pa. 1941)—not officially reported, applying the Pennsylvania statute.

[114] Arizona, Delaware, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee Utah, Vermont and Wisconsin—citations to all of these statutes are given in the table on page 129 of 1944 U. S. Av. R.

[115] GA. CODE (1935) §N-105, 1933 U. S. Av. R. 422; MD. CODE ANN. (1939) Art. 1A, §5, Laws 1937, Ch. 528, 1937 U. S. Av. R. 631. See Birckhead v. Simmon, 171 Md. 178, 189 A. 265 (1936) holding the Maryland statute inapplicable to airports.

[116] P. L. 122, Laws 1929, MO. REV. STATS. 1929, §13905-13915 (Aug. 27, 1929).

[117] Colo. Laws 1937, Ch. 81.

[118] P. L. 99, Laws 1933, GA. CODE 1933, §11-101—11-110 (1933).

[119] Delaware, Indiana, Michigan, Minnesota, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, and Wisconsin. See 1944 U. S. Av. R. 129 for table giving citations to all statutes.

[120] 11 UNIF. LAWS ANN. (1938) §6, p. 163; 1928 U. S. Av. R. 472-476.

[121] Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont and Wisconsin. Full citations to each state statute are given in the table on page 129 of 1944 U. S. Av. R.

[122] Colorado, Delaware, Indiana, Michigan, Minnesota, Montana, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, Wyoming. See 1944 U. S. Av. R. 129 for tables giving citations to all statutes.

of the Uniform State Law for Aeronautics of 1922. This provides that the landing of an aircraft on the lands of another, without his consent, is unlawful unless it is a "forced landing"; and in the case of a "forced landing," the owner of the aircraft is absolutely liable. Six states make unauthorized landing of an aircraft on the land of another unlawful except in case of a "forced landing."[123] Of these six states, Arizona, Idaho and Pennsylvania provide that liability for the damage caused by such landings shall be determined by the rules of torts on land, Maryland makes the aircraft owner *prima facie* liable unless he proves the injury was not caused by his negligence or by the negligence of someone acting for him, and Arizona and Missouri do not specify what legal rules are applicable.

Other provisions of this Uniform Law have already proved to be unsound,[124] and a general rewriting of this Uniform Law to bring it up to date was undertaken by the American Bar Association, the Conference of Commissioners on Uniform State Laws, and the American Law Institute through a joint committee.[125] A series of hearings and meetings were held in 1937 and a tentative draft of a "Uniform Aeronautical Code" was completed.[126] In July, 1938, the National Conference of Commissioners on Uniform State Laws approved "The Uniform Aviation Liability Act," but gave its Executive Committee authority to withhold promulgation of the Act if anything came to its attention which warranted such action. The American Bar Association and the American Law Institute had previously withdrawn from the participation in the work of the joint committee.[127] This new proposed Uniform Act imposes a rule of absolute liability "regardless of negligence" for damage by aircraft to persons and limits the amount which can be recovered. After the adoption of the Civil Aeronautics Act of 1938, the Executive Committee of the Commissioners voted to withhold the promulgation of their new Act, acting under authority conferred by the Conference, until the newly created Civil Aeronautics Authority could study the Act and submit recommendations on its provisions.[128]

The Civil Aeronautics Authority assigned a member of its legal staff to make a study of proposed aviation liability legislation. When the Reorganization Order reorganized the Civil Aeronautics Authority, the study went along with the functions of the new Civil Aeronautics Board. This study was completed in 1941,[129] but the war and its attendant emergencies have caused the Civil Aeronautics Board to delay action upon the recommendations made therein. These recommendations call for a Federal act to cover most aviation tort liabilities. Completion of this

[123] Arizona, Arkansas, Idaho, Maryland and Pennsylvania.

[124] See RHYNE, *op. cit. supra* note 104, at 109-113, 154-157.

[125] See *Report of the Standing Committee on Aeronautical Law* (1937) 66 A. B. A. R. 221.

[126] For the full texts of the three acts comprising this code: i.e., "Uniform Aviation Liability Act," "Uniform Law of Airflight," and "Uniform Air Jurisdiction Act," see HOTCHKISS, TREATISE ON AVIATION LAW (1938) pp. 459-499.

[127] See *Report of the Standing Committee on Aeronautical Law* (1942) 67 A.B. A. R. 186.

[128] *Ibid.*

[129] See SWEENEY, REPORT TO THE CIVIL AERONAUTICS BOARD OF A STUDY OF PROPOSED AVIATION LIABILITY LEGISLATION (1941).

study and recommendations on legislation for aviation accident liabilities is high on the C. A. B.'s post-war agenda.

The above brief review certainly indicates that the Uniform Act of 1922 has not brought uniformity into the aircraft liability field, and it further demonstrates the weakness in any plan calling for state action. All the states will not adopt any "uniform" act which is proposed to replace the 1922 Act, so Federal legislation is essential if real uniformity is to be achieved.

A Federal Bill was introduced in 1943 to be known as the "Air Carriers Liability Act of 1943" which would have brought partial uniformity into the aviation tort liability field by providing Federal jurisdiction over all claims for bodily injuries or death in interstate, overseas, or foreign air commerce.[130] A similar Bill is now pending in Congress.[131]

(E) *Workmen's Compensation*

The liability of companies engaged in the aviation business, whether in the manufacturing of planes or the operation thereof, for damages for injury or death of employees has been subject only to legislation by the states. The Federal Government has no statute defining the liabilities of air carriers engaged in interstate commerce for the injury or death of their employees. In most of the states at the present time, there is in effect various workmen's compensation laws, most of which while containing no specific reference to aviation, are broadly enough drafted so that they have been held applicable to pilots, mechanics and others engaged in aviation.[132]

It has occasionally been urged that aviation is so inherently dangerous that it is without the scope of the Workmen's Compensation Statutes. This argument has been rejected, however, and it has been held that such a statute is applicable where death results from an airplane accident.[133]

The question of whether the injury was sustained while the employee was acting in the usual course of his employment is not, of course, peculiar to aviation business. It has been decided that a mechanic whose duty it was to taxi planes in and out of the hangar was killed "in the course of his employment" where the accident was due to an impromptu flight.[134] So also was a theater manager held to be engaged "in the course of his employment" where he made the flight in question for advertising purposes and with the consent of his employer.[135] However, where a

[130] H. R. 1012, 78th Cong., 1st Sess., Sec. 58. See discussion of this legislation in *Hearings Before the Committee on Interstate and Foreign Commerce on H. R. 1012*, 78th Cong., 1st Sess. (1943) 249-271.

[131] H. R. 532, 79th Cong., 1st Sess. (1945).

[132] See cases cited *infra* notes 133-139; Ross, *The Problem of Workmen's Compensation in Air Transportation* (1935) 6 J. OF AIR L. 1, and 48-69 where the author collects all workmen's compensation laws affecting aviation; Zollman, *Workmen's Compensation Acts and Aircraft Accidents* (1935), *id.* at 70.

[133] Stites v. Universal Film Mfg. Co., 1928 U. S. Av. R. 312, 2 Cal. Acc. Comm. 653 (1915). See also Standard Accident Insurance Co. v. Arnold, 1 S. W. (2d) 434 (Tex. Civ. App. 1927).

[134] Smith v. Indemnity Commission, 1937 U. S. Av. R. 129 (Ohio App. 1937).

[135] Constitution Indemnity Co. v. Skytles, 47 F. (2d) 441 (C. C. A. 5th 1931).

pilot was flying in violation of regulations at the time of the accident, he was held to have acted outside the scope of his employment and compensation was denied.[136]

That Workmen's Compensation Acts of the various states encompass aviation as a business admits of little doubt so long as the "employment" is restricted within the boundaries of the particular state. That air transportation is primarily long-distance, interstate transportation is a fact reiterated many times in this article. Consequently, it is of the utmost importance to determine whether a particular state's Workmen's Compensation Act applies to injuries which occur without the state. In some states the compensation act expressly provides for such a situation. Other states, such as New York, have compensation statutes expressly prohibiting recovery under New York law when the employee is permanently employed outside of the state.[137] However, an aerial photographer who traveled all over the United States but who was hired in New York, from which state he received his instructions, supplies, and pay was held by the New York court to have been "employed in New York" and the New York Workmen's Compensation Act was held applicable, although the accident in which he was killed occurred in California.[138] Similarly, in an action for damages for the wrongful death of plaintiff's intestate whose contract of employment was entered into under the laws of the State of Michigan and who, in the course of his employment, was killed in the crash of an airplane in Illinois, full faith and credit was extended to the laws of Michigan under which plaintiff, by her election to accept an award of compensation under the Workmen's Compensation Act of that state, divested herself of the right to maintain an action for wrongful death in Illinois.[139] While the number of cases in which the extra-territorial effect of Workmen's Compensation statutes has been in issue has been few, enough have been decided to indicate that the tendency is to apply such statutes extra-territorially.

There is no reason, however, why the Federal government could not assert jurisdiction to eliminate the jurisdictional questions which constantly arise in this field.[139a]

(F) *Ownership of Air Space*

Some states have assumed jurisdiction by legislation over ownership of air space and lawfulness of flight. Twenty-three states[140] have adopted the provisions of the Uniform Aeronautics Act of 1921[141] which states:

[136] Re Insurance Corp., 63 F. (2d) 36 (C. C. A. 5th 1933). See also Datin v. Vale, 1931 U. S. Av. R. 175 (Pa., not officially reported).

[137] Baum v. New York Air Terminals, 230 App. Div. 531, 245 N. Y. S. 357 (1930).

[138] Alexander v. Movieto-News, Inc., 273 N. Y. 511, 6 N. E. (2d) 604 (1937).

[139] Biddy, Admx. v. Blue Bird Air Service, 374 Ill. 506, 30 N. E. (2d) 14 (1940).

[139a] See *Hearings, supra* note 130, at 240-249, discussing a proposed amendment to the Civil Aeronautics Act of 1938 which would authorize the Civil Aeronautics Board to take appropriate action to end present conflicts over which state law applies to air carrier employee injuries. See Pillsbury, *Application of Federal Compensation Acts to Aviation* (1933) 4 AIR L. REV. 38.

[140] Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Wisconsin; Hawaii has also adopted the Uniform Act.

[141] 11 UNIF. LAWS ANN. 160 (1938).

"Sec. 3. *Ownership of Space.* The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4.

"Sec. 4. *Lawfulness of Flight.* Flight in aircraft over the lands and waters of this state is lawful unless at such a low altitude as to interfere with the then existing use to which the land or water or the space over the land or water is put by the owner, or unless so conducted as to be eminently dangerous to persons or property lawfully on the land or water beneath."

In Massachusetts[142] and Wyoming[143] statutory provisions substantially like the 1921 Uniform Act, but in different language, have been adopted, but in the other states no legislation on ownership of air space exists.

This Uniform Law was approved in 1921 with the endorsement of the American Bar Association being given in 1922.[145] The American Bar Association's Committee on Aeronautical Law soon found fault with the "ownership theory contained in the above provisions of the 1921 Uniform Law, and in 1930 the Association authorized the committee to draft a new Uniform State Code. In 1931, the committee submitted a draft of a proposed Uniform Regulatory Act, but because of an intense conflict of opinion over the ownership of air space problem, the Association's approval of this proposed act was not requested.[146]

The Bar Association Committee's draft was submitted to the National Conference of Commissioners on Uniform State Laws for study. The Commissioners on Uniform State Laws had proposed that a Uniform Aeronautical Code for adoption by the states should be promulgated to cover a "Uniform Aviation Liability Act," "Uniform Law of Air Flight," and a "Uniform Air Jurisdiction Act." Of this proposed new legislation, the section on air space ownership came in for the most vigorous criticism[147] because it was leaving out the "ownership" idea as to air space which had been carried forward from the *ad coelum* maxim of the common law into the 1921 Uniform Law which it was intended to replace.

While this conflict was raging, the American Law Institute in 1934 adopted a final draft of its *Restatement of the Law of Torts,* which in Section 194 carries forward the ancient and discredited absolute ownership of air space concept which originated in the *ad coelum* maxim.[148]

In 1935, the American Bar Association and the National Conference of Commissioners of Uniform State Laws each at its annual meeting, approved a "Uniform State Regulatory Act" containing proposed new language to replace the 1921 Uniform Act and to eliminate the air space ownership idea.[149] This "Uniform State

[142] Mass. Laws 1939, Ch. 393, Sec. 3. A commission to fix minimum altitudes for flight is provided for.

[143] WYO. REV. STAT. (1931) §4-105.

[145] 49 A. B. A. R. 97, 413 (1922).

[146] 56 A. B. A. R. 69, 317 (1931).

[147] See Hayden, *Objections to New Uniform Aeronautical Code* (1932) 18 A. B. A. J. 121; Hayden, *Airspace Property Rights Under the New Aeronautical Code* (1933) 4 AIR L. REV. 31.

[148] See Wherry and Condon, *Aerial Trespass Under the Restatement of Torts* (1935) 6 AIR L. REV. 113.

[149] 60 A. B. A. R. 119 (1935); see Hayden, *New Deal in Airspace Rights* (1939) 10 J. OF AIR L. & C. 158; Godehn, Brophy, Butler and Hale, *Proposed Law of Airflight* (1937-38) 8 J. OF AIR L. 505, 9 *id.* at 154 *et seq.*

Regulatory Act" and the "Uniform Law of Air Flight" of the proposed new "Uniform Aeronautical Code" are identical. The American Bar Association, in 1941, however, voted to suspend further recommendation of enactment into law of this "Uniform State Regulatory Act," with the idea that uniformity in the aviation field might best be obtained through Federal legislation.[150]

The Joint Legislative Drafting Committee of the Council of State Governments and the United States Department of Justice are now working on a proposed "Harmless Flight of Aircraft Act" which provides "Flight in aircraft over lands and waters of this state shall not give rise to a cause of action at law or in equity based upon a trespass, unless damage other than nominal damage is alleged and proved." This proposed Act if approved and sponsored for adoption by state legislatures will do much to further the cause of civil aviation by eliminating much of the trouble arising out of the antiquated provisions of the 1921 Uniform State Law for Aeronautics.

(G) *Taxation*

State and local taxes on commercial air lines are almost exclusively of the following types:[151] (1) Real property taxes; (2) personal property taxes; (3) net income taxes; (4) capital stock taxes; (5) gross earning taxes; (6) payroll taxes; (7) gasoline taxes; (8) aircraft registration fees; (9) pilot license fees.

The air lines are subject to real property taxes in all states where they own such property.[152] However, they generally lease rather than own their hangars and traffic solicitation offices and operate from municipally owned fields, with the result that their direct payments of this type of tax are small in volume.

Personal property taxes are payable on at least the tangible personalty, such as planes, office equipment, spare motors and fuel, in all states except: (1) Delaware, New York and Pennsylvania, where all personal property is tax free, and (2) Idaho, Maryland, Massachusetts, Michigan, and New Hampshire, where planes are exempt but some or most other tangible personalty is taxable. However, tangible personal property, like other property, is taxable only where it is held to have its tax situs, and few local assessors have asserted jurisdiction over the planes of the commercial carriers.[153]

The tax situs of planes is subject to considerable question. There are at least three conflicting theories on this subject. Some believe that planes operating in more than one state are taxable only at the corporation's domicile; since most of the airlines are domiciled in one of the states which exempts planes, this is about the equivalent of holding that the planes of the interstate carriers are not taxable. Others believe that planes are taxable only at the head office of the airline, the "commercial

[150] 66 A. B. A. R. 148, 221 (1941). For an extensive consideration of this subject and a collection of all the court decisions see RHYNE, *op. cit. supra* note 104, at 82-163.

[151] See C. A. B., MULTIPLE TAXATION OF AIR COMMERCE (a report to Congress), H. Doc. No. 141, 79th Cong., 1st Sess. (1945) 14 *et seq.*; Thompson, *State and Local Taxation Affecting Air Transportation* (1933) 4 J. OF AIR L. 497.

[152] MUITIPLE TAXATION OF AIR COMMERCE, *supra* note 150, at 17 *et seq.*

[153] See Northwest Airlines v. Minnesota, *infra* note 155.

domicile." This theory exempts the planes of several large companies whose head offices are in New York and Pennsylvania, two of the states which tax no personal property. A third theory holds that a state may tax as property a fractional part of the fleet of any airline using a port within the state, the fraction being computed as the ratio of route miles in the state to total route miles or in some other fashion reasonably designed to divide the fleet fairly among the states of operation.

The last theory of tax situs is the one which is likely to result in the most complete taxation of air line property. It is the theory now used in taxing railroad property. Thus far, only eight states have laws providing for this type of taxation of air line property. These states are: Kentucky, Nevada, North Dakota, Oregon, Utah, Washington, West Virginia and Wyoming. In these eight states, the property, both real and personal, is assessed by the state tax department rather than by local assessors, although most of the taxes collected on the assessment go to local governments.

Corporations operating airlines are subject to net income tax in thirty states and the District of Columbia. Most of the remaining eighteen states do not have corporation net income taxes on any corporation; however, three states—New York, Oregon, and West Virginia—tax some corporations on this base but not airlines. There has been some question, however, whether a state could tax the net income of an airline which engaged in no intrastate commerce, with the result that there has been less taxation on this base than might be expected from the above figures. Furthermore, several of the most important air fields in the country are in states which have no corporation net income taxes, such as Florida, Illinois, Michigan, New Jersey, Ohio, Texas, and Washington.

Capital stock taxes are just about as widespread as corporation net income taxes. There is also the same constitutional question concerning an airline which engages in no intrastate commerce. For this reason, and for the further reason that capital stock taxes are usually moderate in rate, the states derive very little from this levy on airlines.

Gross earnings taxes are applicable to airlines in only eight states—Arizona, Indiana, New Mexico, New York, Pennsylvania, Tennessee, Washington, and West Virginia. It has been assumed by all of these states that they could not tax receipts from interstate commerce, and only a few of them, notably New York and Pennsylvania, have enough intrastate commerce to derive appreciable revenues from this source.

The airlines are subject to state unemployment compensation taxes on the same basis as other employers of the requisite number of persons. Aside from the fact that this tax accounts for the largest segment of the airlines' state and local tax bills, there is nothing peculiar about its application to these carriers.

Twenty-one states impose some tax on gasoline used in aircraft.[184] In just over

[184] See MOTOR FUEL TAXES AS APPLIED TO GASOLINE CONSUMED BY AIRPLANES—JANUARY 1, 1945—EXEMPTIONS—REFUNDS—DISPOSITION (Air Transport Association 1945).

half of these, the tax is the regular state motor fuel tax that is applicable to gasoline used on the highways; in the others, the tax is imposed at a lower rate. Kentucky, while taxing aviation fuel used by planes operating locally, exempts fuel used in scheduled flights by planes operating in interstate commerce. Virginia refunds the tax on fuel which is purchased in the state, but is still in the tank when the plane leaves the state. In the other nineteen states, the tax is collected on all fuel purchased or withdrawn from storage in the state, whether used in the state or beyond its boundaries. There is adequate support for this practice in Supreme Court decisions.[154a]

Aircraft registration fees are generally purely nominal fees, from which planes licensed by the Civil Aeronautics Administration, or used in interstate commerce, or owned by non-residents are often exempt. Connecticut, Idaho, and Michigan are the only states with levies higher than $10 a plane (in the latter two states, the registration charge is in lieu of property taxes), and apparently none of the airlines under the jurisdiction of the Civil Aeronautics Board pays fees in any of these three states.

The pilot license fees are usually collectible only from persons not licensed by the Civil Aeronautics Administration and therefore produce little revenue in the aggregate and virtually none from the interstate carriers.

In the only aviation tax case of national import, the Supreme Court of the United States held that Minnesota could tax all of the planes of Northwest Airlines where that airline used this state as its "home port."[155] Northwest is a corporation chartered in Minnesota with its principal offices and overhauling base located in St. Paul. It operates interstate airlines, carrying persons, property and mail over scheduled routes fixed by the Civil Aeronautics Board extending from Chicago to the west coast. Fourteen per cent of the air miles and sixteen per cent of the plane miles were flown within the borders of Minnesota. The planes are registered with the Administrator and St. Paul is listed as their "home port." Except when being overhauled, they were used continuously and interchangeably over the entire route. For the year 1939, Minnesota assessed and taxed all planes of Northwest at their full value.

The opinion of Mr. Justice Frankfurter, in which three other Justices concurred, based the decision upon the rule that the domicile of the owner of tangible personal property has jurisdiction to tax the property so long as it has not acquired a permanent situs in another state. Mr. Justice Jackson's concurring opinion rests upon the analogy between airplanes and vessels and selected as the most practical rule that formerly applied to vessels, making them taxable only at their home port. Mr. Chief Justice Stone, who wrote the dissenting opinion, in which three other Justices joined, was of the opinion that on the facts a proportion of the planes had acquired a situs beyond the jurisdiction for tax purposes, being permanently within the jurisdiction of the other states through which the routes passed, and thus a tax

[154a] Eastern Air Transport, Inc. v. South Carolina Tax Com., 285 U. S. 147 (1932). And cf. American Airways v. Grosjean, 3 F. Supp. 995 (E. D. La. 1933).

[155] Northwest Airlines v. Minnesota, 322 U. S. 292 (1944).

on this proportion would be an undue burden on interstate commerce inasmuch as it would subject that portion to multiple taxation merely because it was used in interstate commerce.[156]

(H) *Other State Jurisdiction*

In addition to aviation subjects already considered above, the states have asserted jurisdiction in a number of other aviation fields. The twenty-three states adopting the Uniform State Law for Aeronautics have also enacted the sections of that law giving the state jurisdiction over crimes committed[158] or contracts made[159] while in flight over the state. This Act as adopted by these states also makes dangerous flying[160] and hunting[161] from aircraft a misdemeanor. Some states have special insurance laws for aviation,[162] and miscellaneous laws on various crimes committed in or by those operating aircraft, aviation education in public schools, transportation of liquor and a wide variety of other laws which are specifically enacted for or are made specifically applicable to civil aviation.[163]

III. LOCAL JURISDICTION

(A) *Airport Acquisition*

While the Federal government has exercised the predominant role, the part played by municipalities in the development of civil aviation certainly ranks next in importance. It is the cities who have worked with the Federal government in the development of airports.[164] Without airports, there could be no aviation so the part played by cities is indeed an important one. The state governments, as such, have expended only 2 per cent of the money spent on the airports which have been developed up to the present time, as states have been content to adopt legislation authorizing their cities to finance airports out of city funds.[165]

Nearly all cities have been authorized by state statutes or charter provisions to acquire and operate airports.[166] Cities have in many instances also been given the jurisdiction to acquire airports outside their corporate limits,[167] to operate airports

[156] The decision is discussed elsewhere in this symposium. Welch, *The Taxation of Air Carriers, infra*, p. 584.

[158] Sec. 7 of the Uniform Act, 11 UNIF. LAWS ANN. (1938) 164.

[159] Sec. 8, *ibid.* [160] Sec. 9, *ibid.* [161] Sec. 10, *id.* at 165.

[162] These insurance laws are all cited in the comprehensive digest of state aviation legislation in 1944 U. S. AV. R., pp. 131-174.

[163] For reference to all of these state statutes, see 1944 U. S. AV. R.

[164] NAT'L AERONAUTIC ASS'N, JOINT AIRPORT USERS CONFERENCE PROCEEDINGS (1944) 136.

[165] *Hearings Before Subcommittee of the Committee on Commerce (Senate) on S. 2 and S. 34*, 79th Cong., 1st Sess. (March 13-23, 1945) 153.

[166] RHYNE, *op. cit. supra* note 104, at 17-45.

[167] State *ex rel.* Walla Walla v. Clausen, 157 Wash. 457, 289 Pac. 61 (1930); City of Spokane v. Williams, 157 Wash. 120, 288 Pac. 258 (1930); McLaughlin v. City of Chattanooga, 177 S. W. (2d) 823 (Tenn. 1944), where the land which Chattanooga acquired was located in the State of Georgia; Fishel v. City and County of Denver, 106 Colo. 576, 108 P. (2d) 236 (1940); Howard v. City of Atlanta, 190 Ga. 730, 10 S. E. (2d) 193 (1940); In the Matter of Petition of City of Detroit, 14 N. W. (2d) 140 (Mich. 1944).

jointly with other cities,[168] and to create special airport authorities to serve entire metropolitan areas.[169]

(B) *Regulations Governing Use of Airports*

Having acquired airports, cities must adopt local safety regulations to supplement the Federal Air Traffic Rules,[170] and any state air traffic regulations which may exist, if local conditions make this desirable. There can be little doubt of the jurisdiction of a county or city which owns an airport to prescribe necessary local safety regulations governing landing, taking off, taxiing, parking, flight restrictions, lighting, fire prevention, starting of engines of aircraft, and fees for use of airport facilities.[171] Such local regulations are valid if they do not conflict with Federal or state regulations on the same subject,[172] and the Federal and state governments have issued only general rather than local rules up to the present time.

A city may deny use of its publicly owned airport to a pilot who has violated local regulations for use of the airport[173] and a concession operator on the airport may refuse to sell gasoline to this pilot if he lands on the airport in spite of the city's order prohibiting him the use of the field.[174] A city may regulate solicitation of passengers by taxicabs at its airport and may require the payment of a fee for the privilege of making such solicitation.[175] A city may regulate the conduct of those using an airport owned by it even though the airport is located outside of its corporate limits.[176]

(C) *Low Flights Over Cities*

Many cities have ordinances prohibiting low flights over their corporate limits.[177] These ordinances have not yet been tested in the courts on conflict with Federal and state regulations, but the courts may well consider these regulations as

[168] Ragsdale v. Hargraves, 198 Ark. 614, 129 S. W. (2d) 967 (1939); see Jarz, *Intermunicipal Cooperation in Establishing, Maintaining and Operating Airports* (1941) 12 J. OF AIR L. & COMM. 301.

[169] Erickson v. King, 218 Minn. 98, 15 N. W. (2d) 201 (1944); Miles v. Lee, 284 Ky. 39, 143 S. W. (2d) 843 (1940); People v. Bartholf, 388 Ill. 445, 58 N. E. (2d) 172 (1944) and the case of People *ex rel.* Curren v. Wood, —— Ill. ——, 62 N. E. (2d) 809, 10 M. L. J. 86 (Sept. 19, 1945), which upholds a later Illinois statute; Monterey Peninsula Airport District v. Mason, 19 Cal. (2d) 446, 121 P. (2d) 727 (1942).

[170] See Federal Air Traffic Rules, 235 C. C. H. ¶9060.0-9060.94, 14 CODE FED. REGS. (CUM. SUPP.) §60.

[171] In City of Spokane v. Williams, 157 Wash. 120, 288 P. 258 (1930) the Court said:

"Patrons of the field, whether they be owners of property abutting upon it or not, have no right in making use of the field to enter it with their ships except at places and in the manner provided by the rules and regulations of the City and its managers and agents in control of the field, which regulations may be changed from time to time as necessity and safety may require."

[172] Rinehart v. Woodward Flying Service, 122 W. Va. 392, 9 S. E. (2d) 521 (1940).

[173] Green v. Messer, 243 Ala. 405, 10 S. (2d) 157 (1942).

[174] Messer v. Southern Airways Sales Co., 17 So. (2d) 679 (Ala. 1944). Here the Court said in part: "Patrons of a municipal airport have no right to make use of the field except in accordance with reasonable rules and regulations adopted by the City for its operation."

[175] Weinstein v. McKenzie, 106 N. Y. L. J. 1458 (N. Y. Sup. Ct., N. Y. Co. Nov. 12, 1941).

[176] Silverman v. City of Chattanooga, 165 Tenn. 642, 57 S. W. (2d) 552 (1933). See Elbrite v. Crawford, 215 Cal. 724, 12 P. (2d) 937 (1932).

[177] MCINTIRE AND RHYNE, AIRPORTS AND AIRPLANES AND THE LEGAL PROBLEMS THEY CREATE FOR CITIES (1939) (NIMLO Report No. 42).

valid under city police power and supplementary to rather than in conflict with Federal and state regulations.[178] A New York statute fixing heights below which aircraft cannot fly over congested areas has been upheld as a proper exercise of the state's police power and held not to be an interference with interstate commerce.[179] These ordinances generally fix height limits below which it is unlawful to fly aircraft and prohibit the following: acrobatic, dangerous, and unusual flying, landings at other than regularly established airports, operation without lights at night, noise and loudspeaking devices, flights over the central part of the city, flights by student pilots over the city, the dropping of objects from airplanes, and the carrying of explosives.[180]

Some of these city ordinances provide that, if a permit is first obtained, exhibition flights may be made over the city, banners can be carried, and circulars dropped from airplanes.[181] In the only case which has arisen on this type of ordinance, the court held that a city police commissioner could temporarily suspend all permits for the operation over the city of aircraft towing banners.[182] The suspension was made after a plane towing a banner made a forced landing near a congested beach endangering the safety of thousands of people.

(D) *Zoning to Protect Airport Approaches*

Another jurisdiction exercised by municipalities in the aviation field is the adoption of zoning regulations to prevent obstructions in the approaches of public airports.[183] While there has been a Bill introduced in the Congress which gave the Federal government jurisdiction over this subject[184] and the Civil Aeronautics Administration once announced a decision that states should do the zoning,[185] it is now apparently conceded by the Federal and state governments that this is a matter of peculiar local application and local governments should do the zoning. Local industrial, residential, and other districts vary from city to city, as do the physical surroundings of each airport, so each airport is a peculiar problem making state and national zoning impractical without regard to legal considerations. The Federal Bill was rewritten and reintroduced without the zoning provision,[186] and both the Federal government and state governments now sponsor a Model Airport Zoning Act for adoption by state legislatures which authorizes cities to adopt zoning regula-

[178] See *Opinion of Attorney General of Minnesota*, 1941 U. S. Av. R. 191 (Nov. 8, 1944); Smith v. New England Aircraft Co., 269 Mass. 639, 170 N. E. 385 (1930).

[179] People v. Katz, 140 Misc. 46, 249 N. Y. S. 719 (N. Y. Sup. Ct. 1931).

[180] See McINTIRE AND RHYNE, *op. cit. supra* note 177, at 21-22. In Silverman v. City of Chattanooga, *supra* note 176, an ordinance prohibiting low flights was held to be a valid exercise of the City police power.

[181] McINTIRE AND RHYNE, *op. cit. supra* note 177, at 22-23.

[182] S. S. Pike, Inc. v. City of New York, 169 Misc. 109, 6 N. Y. S. (2d) 957 (1938).

[183] See generally RHYNE, *op. cit. supra* note 104, at 164-190.

[184] H. R. 1012, 78th Cong., 1st Sess. (1943); Smylie, *Constitutionality of Federal Airport Zoning Bill* (1943) 12 GEO. WASH. L. REV. 1.

[185] MacChesney, *Model Airport Zoning Act* (1941) 12 J. OF AIR L. & COM. 172, and Letter in same issue at p. 182.

[186] H. R. 3420, 78th Cong., 2d Sess. (1944).

tions to protect airport approaches.[187] Thirty-six states now have adopted the Model Act or some similar legislation on this subject.[188] It has been held that an ordinance zoning the area around a city airport is invalid in the absence of an enabling statute on this specific subject,[189] so adoption of such a statute is highly desirable in most states. In some states cities have such a broad grant of powers that they can zone around airports without such a statute but even in these states the statute will remove all argument as to the existence of this authority.

Airport zoning ordinances generally provide that no structures above specified heights may be erected within specific distances of a specific airport.[190] The heights of permitted structures are allowed to increase on a graduated scale with distance from the field.[191]

In two cases airport zoning ordinances have been approved by dictum where courts were passing on other questions.[192] In the first case an airport zoning ordinance was held invalid because there was no state statute authorizing such a regulation,[193] and in the second case an ordinance prohibiting erection of buildings higher than 5 feet within 100 feet of an airport's boundaries was held to be confiscatory and invalid.[194] It is submitted that the courts should uphold zoning regulations to protect airport approaches as a reasonable exercise of the police power of state and local governments.[195] Such regulations certainly promote and protect the safety, convenience and general welfare of the whole community in which a public airport is located.[196] If the community is without air transportation, it will certainly become a "ghost" town in the near future as such transportation is now essential to commercial progress.[197] Justice Cardozo in 1928, in the infancy of aviation as we know it today, stated in one of his most famous court opinions that:[198]

[187] See SUGGESTED STATE WAR LEGISLATION (1944-1945), prepared by a joint legislative drafting committee of the Council of State Governments and the United States Department of Justice which contains this Model Airport Zoning Act as one of the Acts recommended by Federal and State governments for adoption by state legislatures.

[188] See *supra* note 105.

[189] Yara Engineering Corp. v. City of Newark, 40 A. (2d) 559 (N. J. Sup. Ct. 1945); Rice v. City of Newark, 40 A. (2d) 561 (N. J. Sup. Ct. 1945).

[190] See RHYNE, *op. cit. supra* note 104, at 174-175.

[191] *Ibid.*

[192] United States v. 357.25 Acres of Land, 235 C. C. H. §1883 (U. S. W. D. La. 1944) holding that a verdict of "no dollars" as the value of certain air space rights, sought by the Federal government in condemnation proceedings, was correct since an airport zoning ordinance prohibited erection of structures within the air space in question; Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N. E. (2d) 575 (1942) wherein the Court, in holding that adjacent landowners were entitled to an injunction against a private airport's operator, inferred that the Massachusetts Airport Zoning Act should be used to protect airport approaches it said: "It should be remembered, however, that the statute, in 40-A-401 now contains adequate provisions for securing and regulating the approach to public airports."

[193] United States v. 357.25 Acres of Land, *supra* note 192.

[194] Burnham v. Beverly Airways, Inc., *ibid.*

[195] The legal authorities which support this idea are collected in RHYNE, *op. cit. supra* note 104, at 164-190.

[196] Hunter, *The Relation of Airport Zoning to Community Planning and Zoning* (1940) C. A. A. Airports Service Release.

[197] Grant, *Constitutionality of Zoning Law Enacted to Protect Airport Approaches* (1942) 13 J. OF AIR L. & COMM. 272.

[198] Hesse v. Rath, 249 N. Y. 436, 164 N. E. 342 (1928).

"Aviation is today an established method of transportation. The future, even the near future will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness."

Where a city expends a large sum of money on a public airport for the benefit of the community as a whole, that public investment can be lost if high structures in the airport's approaches make it unsafe to use the field. The entire community would suffer from the loss of air transportation. Surely the principles of law which the courts have developed to sustain general zoning and planning of cities, to the effect that the individual property owner can be restricted in the use of his land if the restriction is for the benefit of the community as a whole,[199] applies with great force to the zoning of approaches to public airports. If certain areas of a city can be set aside for industrial uses, others for residential uses and still others for other specific uses in the interest of community benefit by making the best available use of a city's area, it certainly seems that the setting aside of an area for airport use is of the same general type of community planning. The community needs full use of its airport so the individuals in the airport approaches give up some uses of their property for the benefit of the community as a whole. The Supreme Court of the United States in the famous *Euclid* case upheld zoning as a police power regulation rather than a taking of property on the community benefit theory, thereby once again recognizing that property rights are relative rather than absolute.[200] These legal principles lead one to conclude that the courts will uphold regulations zoning airport approaches if the specific regulations are reasonable.

[199] Village of Euclid v. Ambler Realty Co., 272 U. S. 365 (1926); 3 MCQUILLIN, MUNICIPAL CORPORATIONS (2d ed. 1943) §1027 *et seq.*; BASSETT, ZONING (1940); SMITH, ZONING LAW AND PRACTICE (1937).

[200] Village of Euclid v. Ambler Realty Co., *supra* note 199.

APPROPRIATE AREAS OF STATE ECONOMIC REGULATION

FREDERICK G. HAMLEY*

PREFATORY REMARKS (by the symposium editor)

Ordinarily, when a controversial issue is discussed in the course of a symposium, this publication endeavors to obtain champions of each side to present their views in its pages. On the question, however, of how to allocate properly the regulatory functions as between the Nation and the States, it is believed that the pro-federal side has been so adequately presented in aviation literature in the past as to warrant omission of a particularized presentation of that point of view in this symposium.[a] What has not been so adequately presented in the past is the pro-state point of view. That view is here presented by Mr. Hamley. Limitations of space have prevented fuller presentation of that view in these pages.

It may be helpful, however, to present in the following paragraphs at least a summary of the points in the pro-federal side of the argument.

Aviation regulation classifies readily into (a) safety regulation and (b) economic regulation. Over safety regulation (i.e., registration and inspection of aircraft, licensing of airmen, air traffic rules, airworthiness, equipment, etc.) there is hardly any controversy. Apparently everyone seems to agree that the federal agency is the one to do the job, with state officials taking a hand perhaps in an enforcement capacity. The remarks of the North Carolina Aeronautics Commission are perhaps indicative of the views of even state officials:

"Without exception every person questioned or appearing before this Commission was of the opinion that the present rules and regulations of the Civil Aeronautics Authority with regard to licensing of planes, pilots, safety requirements, traffic, and airport specifications are adequate and sufficient. In fact, these regulations are so strenuous that at times they become burdensome to people engaged in aeronautic activities, and have been somewhat of a deterrent to aviation. There is a movement on foot by the Civil Aeronautics Authority to simplify, and make less stringent the Civil Aeronautics Authority regulations. We do not believe that it would be wise or necessary for this state to add to the confusion already existing by attempting to supervise or enforce any regulations concerning the licensing of pilots, planes, traffic, or specifications of airports, or landing fields."[b]

* LL.B., 1932, University of Washington. General Solicitor, National Association of Railroad and Utilities Commissioners. Director of Washington State Department of Public Service, 1941-1943; Special Assistant Attorney General, State of Washington, 1940; Assistant District Counsel, Bureau of Reclamation, Department of the Interior, 1938-1940; Superintendent of Seattle Water Department, 1938; Member of Seattle City Council, 1935-1938. Contributor to legal periodicals.

[a] For a forceful presentation, see Ryan, *Economic Regulation of Air Commerce by the States* (1945) 31 VA. L. REV. 479; also, in this symposium, see Tipton, *Legislative Program for Aviation, infra* p. 564.

[b] N. C. AERONAUTICS COMM., REPORT (Aug. 1, 1944) 14. The Colorado Public Utilities Commission invited a discussion in 1944 of a draft of "Rules and Regulations Governing Air Carriers" which contained numerous safety provisions for operations in Colorado. See Tipton, *supra* note a, at p. 571. The industry's critical reaction may perhaps be exemplified by Braniff Airways' brief, "Suggestions of Braniff Airways, Incorporated, before the Public Utilities Commission of the State of Colorado in the Matter of Rules and Regulations Governing Air Carriers, Case No. 4918." However, Chairman Sherman of that Commission has stated that the draft was meant only to sound out informed views and did not mean that the Commission had taken any position on the proposed rules. (Sept. 1, 1944) 8 AMERICAN AVIATION 43.

And indeed federal certification of all pilots and aircraft flying anywhere in the United States is required by the Civil Aeronautics Board's regulations, resting upon adequate statutory language and constitutional doctrine.[c] It is in the field of economic regulation that controversy arises. Even here there is probably no great legal controversy as to the *constitutional* extent of federal power. It will be a rare airline that will so operate within a single state, and without carrying mail, as not even to compete with airlines of an interstate character and thus be outside the docrine of *Wickard v. Filburn*.[d] So, the real controversy is not whether Congress *can* disable the states from providing economic regulation of intrastate air commerce, but whether it *should* do so. The main points in the argument favoring a hands-off policy on the part of the states can be roughly summarized as follows:

1. Unlike the utility and railroad analogy, there is here no history of state economic regulation.

2. Again, unlike the analogy from those fields, the operational development is not from something local in the beginning and then acquiring national character. Radio presents a closer analogy.

3. Local and national sets of regulations should be avoided so as not to invite legal uncertainties of conflicting jurisdiction and litigation.

4. Diverse regulation of air carriers is harmful, as witness the effect of state regulation of highway carriers. In particular, no airline should be subject to more than one regulatory commission.

5. It is unsound to vest safety regulation in one place (which will be the federal agency) and economic regulation, even partial, elsewhere; they are too interdependent.

6. Aviation transport operates characteristically with a narrow margin of profit; in contrast to early railroad history, there is not the need for local regulation of rates.

7. This narrow margin of profit is peculiarly sensitive to burdensome restrictions, of which multiple regulation is one. With this narrow margin of profit, costs must be kept down, especially in this early stage for the proper development of the industry.

9. Multiple regulation is less flexible in adapting itself to the yet-unknown but sure-to-come new developments, technical and economic. For one commission to adapt itself to fast moving changes is one thing, for 49 it is quite another.

10. At least at present, trunk line operations are the more essential and more profitable and frequently have to "carry" local operating losses; local regulations fostering local operations may impose burdens on the most essential phase of air transport.

11. Federal, and only federal, control over certificates of convenience and necessity can achieve, through encouraging or restricting local operation, particularly in conjunction with mail rate policy, and frequently without actual rate fixing, an integrated plan of relationship between costs, rates, service quality and development. State certification lends itself to fostering a different pattern of interstate air service, varying in seriousness as it affects (1) intrastate operations of interstate lines or (2) intrastate feeders of interstate lines or (3) intrastate lines paralleling or competing with interstate lines. Only as to operations so local as to have none of the above three aspects is state certification appropriate.

12. The above is also true of state exercise of power to prevent service abandonment, to compel extension of service, to require additional local stops, etc.

13. State rate regulation of local service of a carrier operating in several states is not feasible; there is the difficulty of marshaling cost facts, for one thing.

14. State regulation of rates of even lines operating wholly within the state but "engaged" in interstate commerce or carrying mails too readily lends itself to burdening that commerce and the mails. At least federal power should be ready to step in at any time.

15. The above is also true as to a purely intrastate line paralleling or competing with an interstate line.

16. Complications arise from multiple prescription of systems of accounts and reports.

17. The trial examiner technique of the federal agency avoids the need of the presence of the parties in Washington. With trial examiners and reports the federal agency has no difficulty in familiarizing itself with local service needs.

[c] 14 CODE FED. REGS. (CUM. SUPP.) §§60.30, 60.31. Presumably, any flight even "off-the-airways" can "endanger safety in" interstate commerce and thus fall within the statutory definition of "air commerce"; and for any person to operate aircraft "in air commerce" in violation of CAB rules is expressly declared unlawful in the Federal Act.

[d] 317 U. S. 111 (1942).

18. Particularly to be avoided, in state control, is control by existing public service and railroad commissions; they tend to soften the competition and retard development of this new transport competitor.

19. Although adoption of uniform state laws would meet some of the points above made, history shows that uniform proposals are not uniformly adopted nor uniformly interpreted; neither would they be uniformly administered.

INTRODUCTION

Congress, in enacting the Civil Aeronautics Act of 1938, preserved the right of the states to provide economic regulation of intrastate air commerce.[1] But the transcontinental airlines and federal aviation authorities are today urging that this right be withdrawn from the states, and that all regulatory power, both as to local and interstate commerce, be centralized under the Civil Aeronautics Board.[2]

This proposal involves more than a departure from the pattern of aviation legislation which Congress laid down in 1938. It contemplates a complete reversal of the policy which Congress has followed with respect to all other forms of public utility and common carrier regulation. In providing for the regulation of motor carriers, water carriers, freight forwarders, telephone and telegraph companies, electric companies and natural gas companies, Congress has followed a constant and unchanging policy of preserving and strengthening state jurisdiction over matters of local concern.[3] Even with respect to railroad regulation, where federal regulatory authority reaches the farthest, the state commissions exercise primary jurisdiction with respect to intrastate rates, and have exclusive intrastate authority with regard to such matters as service complaints, reparations, schedules, abandonment of service, and railroad grade crossing supervision.[4]

Once it is understood that the plan to disable the states from providing economic regulation of local air commerce involves a fundamental departure from the policy followed by Congress over a long period of time, the full impact and significance of

[1] 52 STAT. 973 (1938), 49 U. S. C. (1941) §§401-681. By the definition of terms in 49 U. S. C. §401(2), 401(10) and 401(21), Federal economic regulation (§§401, 403-404, 407-412, 415-416, 1002-1003) is limited to interstate commerce, thus leaving the states free to regulate intrastate commerce.

[2] *Hearings before Committee on Interstate and Foreign Commerce on H. R. 1012*, 78th Cong., 1st Sess. (1943) Vol. I, pp. 45, 145, 401; Ryan, *Economic Regulation of Air Commerce by the States* (1945) 31 VA. L. REV. 479. Mr. Ryan is a member of the Civil Aeronautics Board.

[3] All of the federal Acts providing regulation of such carriers and utilities contain explicit provisions guarding the rights of the states. As examples, see the following: Motor carriers: (MOTOR CARRIER ACT) 49 STAT. 543 (1935) as amended, 49 U. S. C. (1941) §§302(b), 303(b) (8), 304(a) (4a), 305(f), 306(a) and 316(e); telephone and telegraph companies: (COMMUNICATIONS ACT OF 1934) 48 STAT. 1064 as amended, 47 U. S. C. (1941) §§152(b), 153(e), 221(b) and 410(a) and (b); electric utility companies: (FEDERAL POWER ACT) 49 STAT. 847, 16 U. S. C. (1941) §§824(a) and (b), 824c(f), 824h and 825(a).

[4] In the TRANSPORTATION ACT OF 1920, 41 STAT. 474, 49 U. S. C. (1941) §1ff., amending the INTERSTATE COMMERCE ACT, Congress gave the Interstate Commerce Commission authority to remove burdens upon interstate commerce by ordering a change in intrastate railroad rates. §13(4) of INTERSTATE COMMERCE ACT, 49 U. S. C. (1941) §13(4). The federal agency was also given exclusive jurisdiction over the issuance of securities by §20a(7), over line extensions and abandonments by §1(20), and over consolidations by §5. The prime purpose which Congress had in view in giving the federal agency these powers, was the rehabilitation of the railroads, following a period of federal operation. Railroad Commission of Wisconsin v. Chicago, B. & Q. R. R., 257 U. S. 563, 584 (1922). (Obviously no parallel situation confronts the airlines.) Even then, the authority given to the Interstate Commerce Commission to order changes in intrastate railroad rates was strictly limited. North Carolina v. United States, 325 U. S. ——, 65 S. Ct. 1260 (June 11, 1945).

the proposal is revealed. Prudence dictates that there should not be an abandonment of the historic division of regulatory jurisdiction between federal and state governments, except for most compelling reasons. Those who sponsor such a reversal in the trend of government surely carry the burden of proof. What are the great reasons which compel such a course?

COMING IMPORTANCE OF INTRASTATE AIR COMMERCE

Up to this time air commerce in the United States has been predominantly interstate. Influenced by this fact, there are many who believe that local air commerce will be inconsequential in the future.

Such a conception is singularly short-sighted. The whole experience of the nation in the field of aviation, as in such other expanding industries as automobiles, moving pictures, and communications, argues against adopting arbitrary assumptions as to the ultimate extent and form which this new medium of transportation may take.

The plain fact is that, while railroads and motor carriers began as short-haul carriers and expanded into the long-haul field, air carriers are reversing the process. In the early days of aviation the operating costs, and necessarily the rates, of the pioneering airlines were very high. As a consequence they could compete with surface carriers only on long hauls, where air speed brought a saving in travel time which attracted traffic regardless of rates. But today, with improvements in equipment and operating practices, costs of operation are coming down and with them, air commerce rates. As a result, air carriers are now able to compete with surface carriers on shorter routes even though the time saving on such routes is not as pronounced as on the longer routes. There is every reason to believe that this trend will continue, especially in view of the projected nationwide airport program, the return from the service of thousands of trained pilots and mechanics, and the ever-increasing interest and enthusiasm of the general public.

The community of interest existing between cities within the borders of a single state will afford a fertile field for the expansion of air commerce in the future, just as it has given rise to extensive intrastate operations by surface carriers. Such intrastate air commerce will not be limited to passenger transportation, as the day is fast approaching when the airlines will be carrying a great volume of express and high-grade freight.[5]

Another great field for the development of intrastate air commerce is the handling of passenger traffic to and from suburban areas to the populous city centers. With the advancements that are being made in all branches of aeronautics, particularly with respect to helicopters, the possibilities and opportunities of developing sub-

[5] See testimony of Colonel Gorrell, late President of Air Transport Association, given before House Committee during consideration of H. R. 1012. *Hearings, supra* note 2, at 110. Chairman L. Welch Pogue of the Civil Aeronautics Board, in his address before the Academy of Political Science in New York City on November 15, 1944, pointed out that today the average per-ton mile rate for air express service is about 71.5 cents. He further stated that he expected to see these rates come down to around 15 cents a ton mile in the decade after the war, and then to press "slowly downward from that point."

urban air transport on an important scale cannot be discounted.[6] The great number of applications which have been already filed for authority to render service of this character, some by well-established bus lines and taxicab companies, lends concrete support to this view.

Viewing all of these potentialities, it is conservative to say that the field of intrastate air commerce can become an immensely important part of a well-rounded national air transportation system. This is not to say that a great network of local air routes will spring up within a period of months. Nor is it likely that air carrier service will, within the next few years, prove practicable for distances of less than 100 or 150 miles. But the fact remains that there is a vast potential, undeveloped field for local air commerce, and that conditions are constantly becoming more favorable for the development of that commerce.

THE PHYSICAL CHARACTERISTICS OF AVIATION DO NOT DEMAND EXCLUSIVE CENTRALIZED REGULATION

Air transportation differs from other forms of transportation in two important particulars—the use of air space and the employment of super-speed. Pointing to these obvious facts, the advocates of exclusive federal regulation assert that, whatever may be the justification for dual federal-state regulation of other forms of transportation, surely here is one form that is not adaptable to such a regulatory system. It is urged that we must have a streamlined, centralized regulatory system, attuned to this new mode of transportation, and unfettered by artificial barriers.

There can be no doubt that the physical aspects of aviation differ so radically from other modes of transportation that regulatory processes relating to the physical operation of airplanes must be adjusted accordingly. Thus, while it may be possible for individual states to prescribe safety standards governing trucks and buses, this would be wholly impracticable in the case of aviation. But what we are here considering is economic regulation—not safety regulation. We are not considering what the regulatory patterns should be with respect to navigation, airworthiness of aircraft, or competency of pilots and mechanics—but what that pattern should be with respect to commercial operating authority, rates, and service.[7]

[6] In an address by Chairman Pogue, entitled, "Scouting Our Air Future," delivered on March 21, 1944, before the Southern Commercial Secretaries Convention in Birmingham, Alabama, he said: "The helicopter is far enough along in its development now to make anyone, who has confidence in our aeronautical engineers (and I certainly have that confidence in abundance) believe that it will be a practical flying machine in a few years. . . ."

[7] Of course it is also contended that there is a direct relationship between economic regulation and safety regulation. To some extent this is true, but it does not follow from this that safety regulation cannot be effective without exclusive power, as well, over economic regulation. Such a contention was made during the hearings on H. R. 1012, *supra* note 2, and was repeated in the majority report of the committee, but it has never been documented by any tangible proof. In other fields of regulation, exclusive power to regulate rates and service has not been found essential in order to provide adequate safety regulation. For example, the Interstate Commerce Commission provides vigorous safety regulation of interstate buses and trucks, including safety regulation of such dangerous operations as the transportation of explosives, and this has proved wholly adequate and effective although the states have exclusive authority to provide intrastate economic regulation of the same carriers. There is no basis for assuming that the result would be different in the case of air commerce.

Hence all talk of avoiding the asserted burdens imposed upon interstate motor carriers by reason of state length, width, weight, tail light, and similar regulations, is entirely beside the point. These are safety regulations, not economic regulations, and no one is contending that the states should establish individual safety standards for aviation. Whatever the experience with these motor carrier safety regulations may be, it affords no basis for stating that state rate and service regulation of intrastate commerce performed by interstate motor carriers has been unduly burdensome or, that like regulation of interstate air carriers would be unduly burdensome.

Moreover, once it is fully understood that we are considering only state economic regulation, the oft-repeated truism that planes travel fast and may pass over a state in a few minutes or hours, has no significance. If they pass over a state there would be no economic regulation by that state. There would be no state economic regulation unless the same plane stopped at two different places within the same state on the same flight, and performed some purely local transportation between those points. Then state economic regulation would apply to that local transportation and to no other. The fact that such local transportation was performed two, three, or six times as fast as truck or railroad transportation, would be wholly immaterial.

Similarly, while flight through the air involves no natural barriers or boundaries, when the airplane alights, it comes to rest in some particular state. If it stops twice in the same state, during the course of a single flight, and performs some commerce between these two points, there is no more difficulty in identifying that commerce as intrastate than in the case of motor carriers or railroads.

STATE REGULATION OF INTRASTATE AIR COMMERCE WOULD NOT JEOPARDIZE THE DEVELOPMENT OF A NATIONAL AIR TRANSPORTATION SYSTEM

Most interstate airlines perform some intrastate air commerce. Relying upon this fact, those who oppose dual federal-state air commerce regulation assert that the federal regulatory agency must therefore necessarily have exclusive power to allocate intrastate operating rights as between carriers. Without such jurisdiction, it is asserted, there would be no assurance that interstate air carriers would be able to obtain local operating rights to complement their interstate operations, and no assurance that destructive competition from other local air carriers would be avoided. Similarly, it is contended that the federal agency must have sole authority to fix intrastate rates and fares and to stipulate the conditions of service in performing intrastate commerce, if undue burdens upon the interstate carriers are to be avoided. Only with such over-all federal control, it is argued, can the stability and growth of the national air transportation system be assured.

No one would question that interstate carriers should be able to obtain such intrastate operating rights as may be necessary to assure the stability of long-haul operations. As a corollary, such intrastate operating rights held by interstate carriers must necessarily be protected from destructive competition and must be so

regulated, as to rates and service, that the enjoyment thereof will will not turn out to be a burden. But it can be seriously questioned whether it is necessary completely to overturn established principles of regulation in order to accomplish these objectives.

At the outset, it may be doubted that intrastate business now is, or ever will become, as vital to the economic welfare of the long-haul air lines as this argument for exclusive federal regulation implies. With relatively little intrastate business of their own up to the present,[8] the airlines seem to have prospered. In an address at Oklahoma City in 1943, Commissioner Harllee Branch said: "The majority of our domestic carriers are doing so well financially on their commercial services that they no longer have any need for a mail pay rate which includes any subsidy."[9] If the interstate airlines are today doing so well with almost no intrastate business, one may legitimately wonder why heaven and earth must be turned to secure that business for them in the future.

As a matter of fact, studies made by the Civil Aeronautics Board indicate that on the little intrastate business now performed by the large airlines, costs per passenger mile are more than the average revenue per passenger mile on most intrastate traffic. From this study, the Board concluded that: "In general, route segments which must rely chiefly on local, intrastate traffic require financial support from those route segments carrying a substantial proportion of long-distance or interstate traffic."[10]

Intrastate business becomes an advantage to the interstate carrier only when space on regularly scheduled interstate planes cannot be sold to interstate passengers. Then some additional revenue, without substantially increasing operating expenses, can be obtained by selling this space to intrastate passengers. In cases where such revenue is vital, the long-haul operator should certainly be able to obtain the necessary intrastate operating rights. But it is perfectly plain that such intrastate service, performed incidental to an interstate flight and consisting only of unsold interstate space, would in many cases inadequately meet the legitimate public need for local air service. It would not at all meet the probably far greater demand for local service on routes not paralleling the interstate route. It is thus clear that intrastate air commerce will remain primarily a local problem, with only incidental effects upon long-haul carriers. Being fundamentally a local problem, it should remain in the regulatory hands of the local commissions.

[8] In 1940, less than 16 per cent of the air carriers' passengers moved in intrastate commerce, and they accounted for only 8 per cent of the passenger miles reported by the airlines for that year. Ryan, *op. cit. supra* note 2, at 509.

[9] Securities and Exchange Commission records show that in 1943, 13 airlines reporting to that Commission, made a net profit before income taxes, of $29,224,000, or a net of 14.8% as per cent of sales. Net profit after income tax was shown as $15,322,000, or 7.8% net profit as a per cent of sales. As a per cent of net worth, the 1943 net profit for these 13 carriers, after income taxes, was 14.5%. (June 1, 1945) 9 AMERICAN AVIATION 58.

[10] A study of United Air Lines' Route 11, from Seattle, Washington to San Diego, California, selected for study because it seemed to promise the best opportunity for the intrastate traffic to make a favorable showing, disclosed that the only intrastate segment which did not register an operating deficit was the San Francisco-Los Angeles through service. Ryan, *op. cit. supra* note 2, at 513-516.

To the extent that the vital requirements of long-haul carriers require that they have intrastate operating rights, state regulatory agencies would be perfectly aware of that need and just as anxious and capable of meeting that need as would the federal agency. It has been so with interstate bus and truck lines. Those lines have grown and prospered under dual regulation even though they are a great deal more dependent upon short-haul, intrastate traffic than the interstate air lines are ever likely to be.[11]

What is said above applies to local regulation of intrastate rates and service as well as local regulation of operating rights. Unless we are to assume that state regulatory authorities are wholly incompetent or that they would be completely oblivious to the real needs of the long-haul carriers, there is no basis for contending that state regulation of intrastate rates and service will place undue burdens upon the interstate carriers. Where the only intrastate service is performed by an interstate line the local rate per mile would normally be the same as the interstate rate per mile, just as it is in the case of interstate bus operations. Some of the large interstate bus lines operate through many states and are subject to state regulation in each. Yet instances of burdensome state regulation are extremely rare, if any can be found, and the interstate bus lines are today in excellent financial condition.

This is also true respecting service regulation. If state authorities were disposed to impose unreasonable schedule and accommodation requirements this would surely show up in connection with dual federal-state regulation of interstate bus lines. If, in actual experience hereafter, any problem of this kind shall arise, it will be an easy matter for Congress to enact remedial legislation when need for it is shown. But certainly it is not necessary, in advance of any showing, to guard against this remote possibility in that fraction of the local air commerce field which may be important to the long haul lines, by an outright prohibition of all state regulation.

THE WORK AND COST OF COMPLYING WITH STATE REGULATION WOULD NOT UNDULY BURDEN INTERSTATE CARRIERS

The large interstate airlines pass through many states. In most of these states some intrastate business is handled. It is said that state regulation in these states would almost certainly lack uniformity as between the states and be conflicting with federal interstate regulation. It is also argued that, if required to conform to varying and conflicting state regulations, or even uniform state regulations, regarding certificate rights, tariff filings, schedules, security issues, reports, forms of accounts, acquisitions, mergers and consolidations, a tremendous burden of work and expense would be placed upon such airlines.

[11] In the recent hearings in *Investigation of Nonscheduled Air Services*, CAB Docket No. 1501, the Air Transport Association, according to the Examiner's Report issued on August 22, 1945, p. 6, contended "that motor carrier operations are basically similar in certain respects to air transportation services, and that therefore the experience in the development and regulation of motor carriers should be of value as a guide to the future development and regulation of air transportation service." In (June 15, 1945) 9 AMERICAN AVIATION 22, the following statement appears: "Air transport finds its closest analogy in intercity bus transport . . . according to Dr. L. C. Sorrell, director of research of the Air Transport Association."

The charge that state regulation of local air commerce would result in widespread conflicts and confusion, finds no support in the experience of other forms of transportation and public utilities which are subject to dual federal-state regulation. In these other fields there has been surprisingly little difficulty of this kind, simply because state regulatory agencies have recognized the problem and have taken effective steps to meet it. As independent agencies and as members of the National Association of Railroad and Utilities Commissioners they have developed uniform regulations and uniform methods of administration. An outstanding example of this is the development of uniform systems of accounts for various types of utilities.[12] Another example is the liaison which state commissions have established with federal regulatory commissions, by means of Cooperative Agreements, as a result of which federal and state regulatory activity is closely and successfully correlated.[13]

In the case of air commerce this problem can be met in the same way, and it is not necessary to avoid the problem by invalidating all state regulation. The enactment of uniform state legislation relating to the regulation of local air commerce is altogether feasible. State regulatory commissions are desirous of accomplishing this and they have already developed a Uniform State Air Commerce Bill designed to attain a maximum of uniformity and cooperation as between the states, and as between the federal government and the states.[14] General enactment of this Uniform Bill by the states would automatically produce uniformity between the states as to the basic regulatory law. The Bill contains provisions which would hold to a minimum, conflict and duplication between the federal and state regulatory agencies.[15]

It is possible to argue that the drafting of uniform state legislation is no guaranty of uniformity of regulation—there must first be general enactment of the bill and

[12] Uniform systems of accounts are in effect as to electric utilities, gas utilities and water utilities. NAT'L ASS'N RR. UTIL. COMMISSIONERS (hereafter cited NARUC), 1936 PROCEEDINGS at 104; 1937 PROCEEDINGS at 492, 494; 1938 PROCEEDINGS at 239. There is no regularly adopted uniform system of accounts for motor carriers. However, in I. C. C. ANNUAL REPORT (1938) 841, the Commission had this to say respecting dual accounting control of interstate motor carriers: "It is gratifying to report that splendid cooperation with State authorities has been received in respect to these (federal) accounting regulations. In many States forms of accounts and of reports covering the intrastate operations of such carriers are required by State authorities. Since most large carriers are engaged both in interstate and intrastate operations, it was feared that a heavy burden might be placed upon them by the requirement that different forms of accounts be kept and different forms of reports be required. To meet this situation, informal correspondence was inaugurated with the State authorities with the result that in the case of all states, save one, in which forms of accounts are prescribed for intrastate motor carriers, the carrier will be required to keep but one set of accounts and that is to be in conformity with our requirements."

[13] Such agreements are in effect between the National Association of Railroad and Utilities Commissioners and the Interstate Commerce Commission, the Federal Power Commission, and the Federal Communications Commission, NARUC, 1925 PROCEEDINGS 43; 1937 *id.* 62; 1936 *id.* 268; 1938 *id.* 211, 228.

[14] The Uniform State Air Commerce Bill was prepared, in 1944, by the Committee on Legislation of NARUC, and is set forth in full in the 1944 PROCEEDINGS 161 to 178. A resolution approving the Bill was unanimously adopted at the 1944 Annual Conference of NARUC, held at Omaha, Nebraska, in November, 1944. *Id.* at 178-179. The Committee on Legislation is continuing its study of this matter for the purpose of making any revisions which may be shown to be desirable.

[15] These provisions are summarized in the 1944 Special Report of the NARUC Committee on Legislation. *Id.* at 158-159.

then there must be uniform interpretation. Of course this is true, but the same attitude which has resulted in the drafting of legislation of this kind almost assures that the necessary additional steps will also be taken. The way to make sure of this is to drive forward and complete the job—not to junk everything we have on the remote chance that the complete objective might not be achieved.

It is also said that even if state regulation is reasonably uniform, the work and cost of complying with state regulation in each state where intrastate business is handled, would place an unendurable burden upon the long-haul airlines.

At the outset it should be remembered that such state regulation would pertain only to the airline's intrastate operations, which are always likely to be a minor part of the business of interstate carriers. Moreover state authorities are disposed to go to unusual lengths to reduce and simplify the work of complying with state regulation, as indicated by the provisions of the Uniform Bill, designed to reduce the regulatory burdens upon interstate carriers. In the matter of filing tariffs, annual reports and systems of accounts, for example, the Uniform Bill provides that the form thereof shall conform as nearly as may be practicable, to the forms prescribed by the Civil Aeronautics Board. Similar provisions, now contained in other state regulatory statutes, particularly those relating to railroads and motor carriers, have proved effective in eliminating work and cost to the regulated companies.[16]

The Uniform Bill contains no provisions calling for state regulation of security issues, and no provisions for state surveillance of air carrier acquistions, consolidations and mergers. The objective has been to hold state regulation, at least in the case of air carriers engaged in both interstate and intrastate commerce, to the bare essentials necessary effectively to regulate local rates and service in the public interest. In other fields of common carrier and public utility regulation, where far less effort has been made to simplify state regulation, there has been no substantial complaint from multi-state carriers or utilities regarding the burden of compliance with state economic regulation.

No one can deny that it would be easier and less expensive for the transcontinental airlines to make all their filings and reports at one place—Washington, D. C. But this would also be true respecting the large railroads, bus lines, truck companies and telephonies companies which operate in many states. In these other cases the saving in work and cost to the company has not been considered a suffi-

[16] It is practically certain that state accounting requirements, particularly those respecting segregation of interstate and intrastate business, would not add any burdens to the interstate air carriers additional to those provided in H. R. 3446, 79th Cong., 1st Sess., now pending before Congress. That bill was introduced, on June 12, 1945, by Congressman Bulwinkle of North Carolina and has for its purpose the avoidance of multiple taxation of air commerce. It incorporates the recommendations made to Congress in a report, dated April 3, 1945, filed by the Civil Aeronautics Board, following an investigation of multiple taxation authorized by Public Law No. 416, approved July 3, 1944, 58 STAT. 723. The bill would require each air carrier to keep records and file reports showing (1) the sum of its passenger, freight, and express tonnage originating and terminating in each state, (2) the sum of its passenger, freight, and express revenues originating in each state, (3) scheduled aircraft arrivals in and departures from each state, equating according ot the size of the plane, and (4) wage and salary payments to persons employed by it within each state.

cient reason for centralizing all regulatory jurisdiction in the federal government. The minor inconveniences and expenses incident to state regualation are part of the responsibilities which airlines must be prepared to shoulder if they are to take their place, as transportation agencies of full stature, under our dual system of government. The airlines must assume that responsibility, and in return they are entitled to the sincere cooperation and assistance of state officials in seeing that those added inconveniences and expenses are held to a minimum.

THE FULL DEVELOPMENT OF LOCAL AIR COMMERCE AND ITS EFFECTIVE SUPERVISION IN THE PUBLIC INTEREST REQUIRES STATE ECONOMIC REGULATION

Those who favor exclusive federal economic regulation of air commerce do so not because they believe that this is necessary in order to have a full development of local air commerce. Rather, their contention is that, regardless of what is best for local air commerce, state economic regulation would prove so detrimental to the stability and growth of the long-haul airlines that a dual system of regulation cannot be tolerated. In the foregoing section of this paper the principal arguments which are advanced in support of this view have been examined.

In devoting so much of this discussion to the problems of the large interstate lines, however, the fact must not be lost sight of that probably the great bulk of intrastate air commerce will be performed by small lines operating in a single state, or in two or three states at most. Therefore no one is privileged to view this legislative problem entirely from the standpoint of the long-haul lines. We must give due consideration to the advantages which the small lines will gain by local regulation—advantages which will result in promoting the development of an extensive local air transport system. We must also give due weight to the fact that local economic regulation of local air commerce will be a great deal more effective, in protecting the public interest, than centralized federal regulation of such local commerce could ever be.

The desirability of developing local air commerce as fully and rapidly as public convenience and necessity requires is not open to argument. Congress itself has said that there should be encouragement and development of an air transportation system properly adapted to the present and future needs of the nation's commerce, of the Postal Service, and of the national defense.[17] Certainly the future needs of the nation's commerce and of the Postal Service, and perhaps also of the national defense, cannot be met except by an air-transportation system which serves every community in America which needs and can support air service.

There are special and urgent reasons existing today, not present when Congress established this policy, why local air commerce should be encouraged. Today we have thousands of trained airplane pilots and mechanics returning to civilian life from the nation's armed services. At the same time the country is faced with a

[17] Civil Aeronautics Act of 1938, §2(a), 52 STAT. 973, 49 U. S. C. (1941) §402(a).

most perplexing problem in finding employment for the millions of servicemen and war workers who must now return to peacetime pursuits. Proposals to launch a large-scale nationwide airport construction program are now before Congress. It seems obvious that, in these three special factors, there lies the basis and need for a sound and speedy development of local air commerce.

As stated above, although the long-haul airlines may substantially increase their intrastate business in the years to come, most of that local business must be developed and served by local and feeder lines. The large interstate airlines will always, and almost necessarily, give precedence to their long-haul business. Space for a short ride between two intermediate points along the trunk-line will be sold only when it cannot be sold to a passenger who is taking a long ride. Hence intermediate points cannot ordinarily expect to obtain adequate local service from the trunk lines which pass through.[18]

If the development of local air commerce is important, and if the long-haul airlines cannot be depended upon to supply the need for such service, then we must look to the small operators. But the development of a network of local operators cannot come about under centralized federal regulation any more than the development of our nationwide system of motor truck and bus lines could have come about under exclusive Interstate Commerce Commission regulation. Under exclusive federal regulation, no local carrier could begin operations until it had obtained a certificate from the Civil Aeronautics Board in Washington, D. C. The expense and delay which this would entail, and the opposition which would undoubtedly be encountered in many cases from a battery of experts and attorneys, representing the large airlines, would be bound to retard and discourage adequate local development.

A few months ago a comparatively small company which has been rendering some irregular-route service in Oklahoma, applied to the Oklahoma Corporation Commission for a certificate authorizing scheduled and non-scheduled intrastate air service as a common carrier of passengers and property operating over 11 proposed routes and serving 39 towns in that state. The Commission found, after a hearing, that public convenience and necessity required such service and that the applicant is fit, willing, and able to perform the service. Hence it granted the application.[19] Commenting upon the protests filed by two large airlines, the Commission said:

[18] Congressman P. W. Griffiths of Ohio graphically portrayed this situation in an address on the House floor, in support of H. Con. Res. 64, 79th Cong., 1st Sess., 91 Cong. Rec., July 10, 1945, at A-3625. H. Con. Res. 64, introduced on June 22, 1945, by Congressman Jennings Randolph of West Virginia, would express Congressional approval of the expansion of the air transportation system "so that it will include not only the larger cities but also, through feeder line service, the greatest practicable number of smaller cities and towns." Passage of this resolution has also been urged, on the floor of the House, by Congressmen Schwabe and Randolph. 91 Cong. Rec., July 2, 1945, at A-3449; *id.*, July 9, 1945, at A-3619. A similar resolution, S. Con. Res. 25, 79th Cong., 1st Sess., introduced by Senator Warren Magnuson of Washington, has been favorably reported, without amendment, by the Senate Committee on Interstate Commerce (REPORT No. 558, dated September 12, 1945). This Committee REPORT and the speeches referred to above indicate that some members of Congress are dissatisfied with the progress being made in extending air service to the smaller population centers.

[19] *In re* Application of Central Airlines, Inc., cause No. 18717, decided May 1, 1945. Incidentally, the Oklahoma Commission evidenced its disposition to work cooperatively with the Civil Aeronautics

"Braniff Airways, Incorporated, and American Airlines, Incorporated, protestants herein, have been serving the State of Oklahoma with air service for many years, and have never seen fit to furnish scheduled service to any towns in Oklahoma except Tulsa and Oklahoma City, and for a brief period Ponca City."

Why should this small company have been required to come to Washington, D. C., for authority to serve these 39 Oklahoma towns? Why should Waterman Airline, Inc., which was recently granted intrastate air carrier rights by the Alabama Public Service Commission to serve 10 cities in that state, be forced to the expense, delays and hazards of filing its application with the Civil Aeronautics Board?[20] What is the likelihood that these and similar applicants would have applied to the federal agency, if that course were necessary, and what prospect would there have been for favorable, speedy action on the application? Merely to pose some of these questions is to show that local air commerce cannot fully and expeditiously develop under centralized control.

It is asserted that any applicant to a state agency for an intrastate air carrier certificate, would also be required to apply to the Civil Aeronautics Board for a certificate if the applicant also desired to carry interstate traffic. It is argued from this that state regulation will not decrease the burden upon an appliacnt for intrastate rights, but will actually increase the burden by requiring it to apply to two agencies instead of one.

This is true in the case of applicants which operate in more than one state and which must therefore have an interstate certificate before beginning any service. But we are here primarily concerned with the applicant who plans to perform air service within a single state. Except for the construction placed upon the Act by the Civil Aeronautics Board in the *Canadian Colonial Airways* case,[20a] the only single-state air carriers which would require interstate certificates are those which have arrangements with other carriers for a continuous carriage under joint through rates to or from a point without such state.[21] But, in any event, any single-state applicant which will need an interstate certificate, under any construction of the Act, would undoubtedly apply first to the state authorities for its local operating rights. These rights would constitute the major portion of the business and the applicant would make its initial and most comprehensive showing before the state agency.

If the application for intrastate rights is granted, and the inauguration of local service uncovered a need to render incidental interstate service over the same routes, the applicant would then file a second application with the federal agency, except

Board, by inserting the following provision in its order: ". . . said Central Airlines, Incorporated, be, and it is hereby, authorized to transport inter-state passengers and property over said routes when and if such authority is granted from the proper federal agency; and that this order is no way derogatory to the Civil Aeronautics Board's jurisdiction over inter-state airline service, but in consonance therewith."

[20] Waterman Airline, Inc., applicant, Docket 8937, decided August 30, 1945. This application was not protested by anyone, although representatives of some of the large airlines were present at the hearing.

[20a] C.A.B. v. Canadian C. Airways, 41 F. Supp. (S. D. N. Y. 1940) 1006.

[21] The burden of filing dual applications could be entirely eliminated in this class of cases if Congress would amend the Civil Aeronautics Act to overcome the Civil Aeronautics Board's position in the *Canadian Colonial Airways* case. This suggestion is further discussed in the final section of this paper.

to the extent that the need of obtaining such interstate authority is dispensed with by amendments to the Act, as hereinafter suggested. At the time of applying for such interstate certificate the applicant would already be in business. The interstate rights would be purely incidental and the granting or denying of the application would not, in most cases, substantially affect the stability of the business. But if the applicant, prior to inaugurating any service, had to file the original application, for both intrastate and interstate rights, with the Civil Aeronautics Board, and had to make its initial case before that Commission in Washington, D. C., or before Board examiners at some regional hearing, it would face, at the outset, a most serious financial and time-wasting burden.

Up to this point the discussion under this section has been confined to the matter of certificate regulation, and has reviewed the reasons why exclusive federal control of operating rights would stifle the growth of intrastate air commerce. But economic regulation involves a great deal more than the granting or denying of original operating rights. There will be applications for extensions; for the transfer of rights; for discontinuance of service, abandonment of lines and cancellation of certificate authority. Then there are the innumerable regulatory matters relating to fares and rates, tariff filings, schedules, connections, service complaints and enforcement.

Once we grant that local air commerce will become substantial, it is manifest that detailed regulation thereof by a central bureau in Washington, D. C., would be both impracticable and ineffective. It would be impracticable because long-distance regulation from the nation's capital would entail unendurable expense and delay for small local operators; because the governmental machinery necessary to administer all local regulation from a central bureau would be unwieldly beyond description; and because top officials of the federal agency could not give proper attention to the manifold problems entailed in regulating all the local carriers of the nation, without undue distraction from their more important function of regulating the trunk-line carriers. Centralized regulation of local air carriers from an office in Washington, D. C., would be ineffective, because the central bureau could not possibly have thorough and current knowledge of local problems and conditions, and because centralized control would deny to the patrons of local air lines and to the general public directly affected by local air service, a readily accessible means of obtaining relief from inadequate service, undue discriminations and unreasonable rates.

The only alternative, under exclusive federal regulation, would be for the central agency to set up a network of regional and district offices throughout the country. The defects and inadequacies inherent in such a system are fully as objectionable as if all federal regulation were centered in Washington. Experience with other federal administrative systems of this kind teaches that regional and district offices would operate under limited authority, without power to make final decisions, and hence actually would add to the delay and expense of federalized control. As to any matters concerning which the regional and district officers were authorized to make decisions and act, local carriers and the public would have to be content with

the judgment and rulings of minor federal officials having no responsibility to the people directly affected, but only to federal commissioners in a far off city. At best, such a system would be a poor substitute for regulation of local affairs by local officials responsible to the people they serve; officials having the authority to make prompt and final decisions, unfettered by inadaptable rules and procedures manufactured a long ways off.

The purpose of the foregoing discussion, as indicated by the heading of this section, has been to show that the full development and effective regulation of local air commerce requires the retention of state regulatory jurisdiction. But there is also good reason to believe that the retention of state regulatory authority will also, in the long run, prove of great benefit to the long-haul airlines. Chairman Pogue of the Civil Aeronautics Board, has expressed the view that while air carriers will affect profoundly the passenger business of surface transport, they will also produce opportunities for wider and more frequent business contacts which will result in increased bulk cargo for surface carriers.[22]

By analogous reasoning, it can be said that the development of a comprehensive network of local airlines, achievable only under the fostering influence of state regulation, will stir up business for the trunk-line carriers. Local airlines will play an important part in educating the public to the advantages of air travel, and in this way will develop potential customers for the transcontinental lines. A man who becomes accustomed to traveling by air, or sending package freight by air, over a 200 mile intrastate route, is much more likely to use the long-haul air lines for his 2,000-mile journeys than would otherwise be the case.

In what has been said above, no mention has been made of "states rights" or "state sovereignty," as a reason for advocating state economic regulation of intrastate air commerce. There has been presented, instead, the substantive reasons why federal regulation of such intrastate commerce would be inimical to the public interest. Any attempt to criticise the proposal for exclusive federal economic regulation as a challenge to our dual form of government is usually met by the rejoinder that, in this day and age, and with respect to anything as important and different as aviation, resort should not be had to "formalistic" or "legalistic" arguments of this character.

It is not here intended to discuss this proposed encroachment upon state powers from the standpoint of what is legally possible as a matter of constitutional law. Rather, the purpose is to point out the underlying governmental principles which are involved, and to suggest that they be given due weight in the consideration of the whole question. Regardless of legal technicalities, there are many who feel that the concept of a dual form of government springs from a deep conviction that local problems are best dealt with by local government, and that legislation which ignores or undermines that concept is not good for our people.

When a new field of administrative action opens up, it is often easier and simpler to provide for exclusive federal administration. But the liberties and welfare of the

[22] Address before the Academy of Political Science, New York City, November 15, 1944.

people cannot always be safeguarded by chosing the easy or simple way. The responsibility rests primarily upon the legislative branch of government, Congress and the state legislatures, to find a way, easy or not, which will preserve to the greatest practicable extent the dual form of government conceived by the founding fathers. Legislators cannot, in good conscience, pass over these basic considerations on the theory that the courts will adequately preserve and apply any constitutional concepts which may be involved. As Mr. Justice Holmes said: "Legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[23]

Congressman Hatton W. Sumners of Texas, Chairman of the House Judiciary Committee, has put it well:[23a]

"Our whole political system is based on the principle of local self-government. . . .

"In weakening the states we weaken the whole fabric of free government. The inescapable price of free government is that we exercise it. The most destructive force in the world is nonuse. If we do not use our powers of self-government in the states we will awaken one day to find that self-government has passed irrevocably out of our hands."

Not alone from the standpoint of the states, but also from the standpoint of the federal government, it is necessary to call a halt to the process of creating and pyramiding federal bureaus and agencies. Congress, and Congressmen, are already overwhelmed with the task of legislating with respect to our present massive federal governmental machinery, and with the task of assisting constituents at home who are understandably incapable of finding their way around in the labyrinth of Washington bureaucracy. Congress has before it, at the present time, a number of resolutions which have for their purpose the decentralization of the federal government.[24] If it is desirable to decentralize the federal machinery which has already been built up in Washington, it is doubly desirable to reject proposals for the expansion of existing federal agencies beyond the point absolutely necessary to meet the national needs.

A New Approach to the Problem

The determination of appropriate areas of federal and state jurisdiction to regulate air commerce is a problem demanding prompt solution. Aviation is today poised for tremendous expansion, but uncertainty as to the future regulatory pattern constitutes a retarding element. It is becoming increasingly clear that no solution involving the complete disablement of the states can be promptly, if ever, achieved. Such a proposal has already been before Congress for two and a half years and no

[23] Missouri, Kansas & Texas R. R. v. May, 194 U. S. 267, 270 (1904). Mr. Justice Frankfurter used this quotation, with approval, in Federal Communications Commission v. Pottsville Broadcasting Co., 309 U. S. 134, 146 (1940).

[23a] (Sept. 1943) Reader's Digest.

[24] H. J. Res. 64, 79th Cong., 1st Sess., introduced by Congressman Sumners, would create a joint committee "to investigate and report as to how the Federal Government may get relief from the overburden of its governmental responsibility." See, also, H. Res. 32, 79th Cong., 1st Sess., introduced by Congressman Ludlow of Indiana; S. Con. Res. 24, 79th Cong., 1st Sess., introduced by Senator Wiley of Wisconsin; and Senator Wiley's explanation, on the Senate floor, of the purposes of S. Con. Res. 24, 91 Cong. Rec., July 21, 1945, at 8025.

perceptible progress has been made.[25] The recent action of the Senate in incorporating the Council of State Governments' amendments into the McCarran Federal Airport bill,[25a] indicates rather clearly that the proposal for exclusive federal regulation will not have easy going in the present Congress.[26] Plainly the time has come for a new approach to this whole problem.

As the basis for a new approach, it must be recognized that, under our system of government, the states have primary jurisdiction in the field of local action but the federal government has an over-riding power which may be exercised where necessary to attain national objectives. There cannot be insistance upon the very letter of state jurisdiction, where such a course imperils the general welfare. Correlatively, there should be no federal interference with state jurisdiction not clearly required by the general welfare.[27] In aviation, as in all other fields of governmental action, the designation of appropriate areas of federal and state jurisdiction involves "a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.[28]

Applying these guiding principles, let us start with the premise that the traditional federal and state spheres of authority will be generally preserved, but that

[25] Hearings on H. R. 1012, 78th Cong., 1st Sess., the first measure proposing exclusive federal regulation, were held in February and March, 1943. A serious division of opinion developed in the House Committee on Interstate and Foreign Commerce, which held these hearings, especially on this question of exclusive federal control. A Committee Report (No. 784) was finally issued on October 20, 1943, in which the Committee majority recommended enactment of a new bill, H. R. 3420, 78th Cong., 1st Sess., which bill also provided for exclusive federal jurisdiction. Nine members of the Committee signed a minority report severely criticising H. R. 3420, particularly upon the jurisdictional question, and recommended enactment of H. R. 3491, 78th Cong., 1st Sess., which left substantially undisturbed present state authority over local air commerce. H. R. 3420 then went to the House Rules Committee and several attempts were made by its sponsors to get the bill out of that Committee so that it could come on the House floor for action. However, this proved impossible, due mainly to the controversy over federal-state jurisdiction and to the contention that further hearings should be held on the general subject. H. R. 3420 expired in the House Rules Committee when the 78th Congress adjourned sine die. In the 79th Congress, several aviation regulatory bills have been introduced, as follows: S. 1, by Senator McCarran of Nevada; S. 541, by Senator Johnston of South Carolina (a companion bill to H. R. 674); H. R. 478, by Congressman King of California (a companion bill to S. 1); H. R. 674 and H. R. 3383, by Congressman Lea of California. These bills range from measures almost wholly disabling the states to others which, with slight modifications, would fully preserve state authority. Although most of these new bills were introduced in January, 1945, no Committee hearings were held prior to the 1945 summer recess of Congress. Thus, by the fall of 1945, two years and a half had passed since the issue first came before Congress, and neither House had yet reached a decision.

[25a] S. 2, 79th Cong., 1st Sess. (1945).

[26] The amendments so changed S. 2 as to require all federal matching funds to be channeled through a State agency. In presenting these amendments, Senator Brewster of Maine, said: "The Council of State Governments is very much concerned about this matter inasmuch as it represents, perhaps, another camel's nose under the tent in derogation of State responsibility." 91 Cong. Rec., Sept. 10, 1945, at 8584.

[27] At the 1944 Conference of Governors, Governor Herbert R. O'Conor of Maryland, discussing the subject, "The Sovereign States," said: "The one factor, therefore, in state-federal relations that has stood absolutely unchanged throughout the years is their purpose. They are right when they serve best the welfare of the people; they are wrong when they interfere in any way with that welfare. Let jurisconsults argue legal technicalities as they will, they cannot argue away the simple fact that neither state nor federal government has a right to pursue a policy detrimental to the general welfare." (1945) 18 STATE GOVERNMENT 127.

[28] See Palmer v. Massachusetts, 308 U. S. 79, 84 (1939).

adjustments will be made where required to meet the special problems of air commerce and to promote the general welfare. The line of demarkation between interstate and intrastate commerce thus becomes a general guide but not an inflexible boundary between the spheres of federal and state control. As Mr. Justice Holmes has said, "Some play must be allowed for the joints of the machine. . . ."[29]

There are two principal factors which appear to justify adjustments which will extend federal authority beyond traditional lines. One of these is that the overwhelming preponderance of the business handled by the long-haul airlines is, and will continue to be, interstate commerce. The other is that the sizable rates of return being earned by the airlines are based upon relatively small capitalizations, and that their comparatively narrow margin of profit, when measured in dollars, makes regulatory compliance costs a more vital factor than in the case of most other types of carriers and utilities. These factors call for a limitation upon state regulation applicable to interstate carriers, to those matters which are absolutely essential in order to regulate effectively and develop local commerce.

With this objective in mind, Congress and the state legislatures might well conclude that there should be no state regulation of interstate carriers as to such matters as consolidations, mergers, acquisitions, and security issues.[30] Similarly, it might be decided that the federal and state laws should provide that aircraft, while in the course of regularly scheduled interstate flights calling for landings in two or more states may, in the course of such flights, carry persons, property or express in intrastate commerce without securing permission or approval of any state or local authority. This would entirely eliminate the necessity of an interstate carrier obtaining an intrastate certificate covering points along main line interstate routes, unless and to the extent such carrier desired to operate special intrastate flights over part of such route.

Other restrictions relating to the form of tariffs, annual reports and systems of accounts, and authorizations for the extension or abandonment of service or routes, could undoubtedly be developed where desirable to relieve the long-haul carriers from unnecessary regulatory burdens. While most state legislatures would probably be willing to conform to any general policy of this character which might be decided upon, Congress has the undoubted power to make mandatory provisions for such limitations upon state regulation of interstate carriers.

The same factors which would justify some limitation upon state jurisdiction over air carriers whose business is predominantly interstate, would likewise call for some limitation upon federal jurisdiction over air carriers whose business is predominantly intrastate. For example, it would be entirely feasible and proper to exempt from federal economic regulation, air carrier service performed solely within a municipality, contiguous municipalities or commercial zone, just as a similar ex-

[29] See Missouri, Kansas & Texas R. R. v. May, 194 U. S. 267, 270 (1904).

[30] The Uniform Air Commerce Bill developed by the National Association of Railroad and Utilities Commissioners in 1944, contains no provisions for the regulation of these matters. See *supra* note 14.

emption now applies to motor carriers.[31] Such an exemption would probably not have any important application for several years, until such time as common carrier helicopter service becomes practicable.

It would also be feasible and proper to exempt from federal regulation interstate commerce performed by air carriers operating in a single state, where the carrier does not perform such interstate business under a common control, management, or arrangement for a continuous carriage or shipment under joint through rates to or from a point without such state.[32] An Amendment of the Civil Aeronautics Act, to accomplish this, would overcome the strained construction of the present Act manifested in the position the Civil Aeronautics Board took in the *Canadian Colonial Airways* case.[33] In this case the Civil Aeronautics Board took the position that Canadian Colonial Airways, Inc., was an interstate carrier between Niagara Falls, New York, and New York City, because approximately 15 per cent of the company's passengers continued, via other air or surface carriers, to points beyond the State of New York. This route of Canadian Colonial Airways was confined solely to points within the State of New York; the company had no arrangement for joint through rates with any other carrier; it did not know any of its passengers were engaged in an interstate journey; and it expressly advertised that it was not authorized to transport interstate passengers.[34]

Under such a construction of the statute there could scarcely be an air carrier in the entire country, no matter how limited its operations, which would not be an

[31] Sec. 203(b) (8) of Interstate Commerce Act, 49 U. S. C. (1941) §303(b). H. R. 674, 79th Cong., 1st Sess. (1945), provides for such an exemption, but such provision appears to be circumscribed by provisos which renders the exception almost nugatory.

[32] This would be analogous to the exemptions from federal motor carrier regulation, contained in sections 203(b) (8), 204(a), (4a) and 206 (a) of the INTERSTATE COMMERCE ACT, 49 U. S. C. (1941) §§303(b) (8), 304 (a) (4a), and 306(a). Such exemption from federal regulation would not mean that these minor phases of interstate commerce would go wholly unregulated. There can be no question regarding the power of the states, under the commerce clause, to regulate incidental interstate commerce performed by a local carrier engaged primarily in intrastate commerce, where Congress expressly authorizes state regulation thereof. In the recent decision of the United States Supreme Court in Southern Pacific Co. v. State of Arizona, 325 U. S. ——, 65 S. Ct. 1515, 1520 (1945), the Court said: "Congress had undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible (citing cases), or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce (citing cases)." Even where Congress has not expressly authorized state regulation, if Congress has failed to provide for federal regulation thereof, and if it is a matter admitting of diversity of treatment acording to the special requirements of local conditions, then state regulation may be validly exercised until Congress determines to enter the field. *See:* Cooley v. Board of Wardens of Port of Philadelphia, 12 How. (U. S.) 298, 319 (1851); Minnesota Rate Cases, 230 U. S. 352, 399 (1913); Port Richmond Ferry v. Hudson County, 234 U. S. 317, 331 (1914); Pennsylvania Gas Co. v. Public Service Commission, 252 U. S. 23 (1920), disapproved on other grounds in East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 472 (1931); Eicholz v. Public Service Commission, 306 U. S. 268 (1939); and cases cited in Southern Pacific Co. v. State of Arizona, *supra* note 32, at 1472.

[33] C.A.B. v. Canadian C. Airways, 41 F. Supp. 1006 (S. D. N. Y. 1940).

[34] While many court decisions were cited in the briefs, there seems to be no decision directly on the point. The case in question was terminated by a consent decree and hence does not constitute a judicial precedent. It is interesting to note, however, that the Interstate Commerce Commission has reached a contrary conclusion on the same question. *See:* Red Star Lines, Inc. (Extension of Operations), 3 M. C. C. 313 (1937); Virginia Stage Lines, Inc. (Purchase), 15 M. C. C. 519 (1938).

interstate carrier subject to federal regulation. Moreover, this construction deprives local carriers of any freedom of choice as to whether they shall engage in interstate commerce or solely in intrastate commerce. The amendment here suggested would exempt, from the requirements of dual regulation, a host of small local air lines, whose only interstate business would be the occasional carriage of passengers or property actually in the course of an interstate journey, but not being carried on a through route or joint rates. Needless to say, there is no more necessity for federal regulation of these inconsequential fragments of interstate commerce in the field of aviation than there is in the case of motor carriers.

There is also good reason to exempt, from federal economic regulation, local air carriers operating solely between points in a single state whose aircraft happen, in the course of their flight, to pass through the air space over another state. Under the present law, such local carriers are classed as interstate carriers and made fully subject to federal regulation.[35] If an aircraft does not land in the other state it is not actually transacting any business therein. The mere fact that safety or geographical conditions, or the location of airway facilities, make it occasionally or regularly desirable for an aircraft to enter the air space of one state while traveling between two points in another state, should not preclude the operator thereof from claiming exemption, as a local carrier, from federal economic regulation.

The above suggested adjustments in the traditional line of demarkation between federal and state jurisdiction are only intended to be indicative of the possibilities. Careful analysis by federal and state authorities, working cooperatively together, would undoubtedly disclose other and different methods of achieving "a wise accommodation between the needs of central control and the lively maintenance of local institutions." Such cooperation must not stop with the drafting of legislation, however. There should be continuous and active liaison between federal and state regulatory officials in dealing with the manifold and everchanging problems which commercial aviation of the future will present.

The new approach to the problem of regulatory jurisdiction, here suggested, is in reality a new approach only with respect to air commerce. It is a well-established and often-used approach in other fields of common carrier and public utility regulation. In these other fields, the policy of recognizing basic jurisdictional areas but developing adjustments to meet special problems, has proved uniformly successful. Had they not been tried, and had they not proven successful, there would be little left of state authority and power today—all regulation would stem from Washington, D. C. If there is to be a departure from that policy in the case of air commerce, it should come only as a last resort and after giving the long-established and heretofore successful system of federal-state regulation a fair trial.

[35] The Civil Aeronautics Act of 1938, §1(20) and (21), 49 U. S. C. (1941) §401(20) and (21).

THE STATUS OF NON-SCHEDULED OPERATIONS UNDER THE CIVIL AERONAUTICS ACT OF 1938

GEORGE C. NEAL*

In no phase of the Federal regulation of civil aviation has greater confusion existed than with respect to the status under the Federal Civil Aeronautics Act of 1938[1] of what are commonly called "non-scheduled operations." The legal principles involved are difficult enough, but the general lack of understanding on the part of prospective operators has been increased by the loose use of such terms as "non-scheduled operations," "contract operations," and "charter operations." There is a tendency to use these terms interchangeably as describing all the various types of operations which do not operate over a fixed route or on trips scheduled in advance at fixed hours of the day, and to lump all operations so described into the category of those which are not subject to regulation. The terms "contract operations" or "charter operations" must be used with strict regard to their basic legal concepts before they may be safely used in describing the scope of the provisions of the Civil Aeronautics Act; and while "non-scheduled" may accurately describe the factual distinction between two major classes of commercial air transport operations, from the legal point of view the term is misleading. The scope of Federal aviation regulation is not prescribed by the Civil Aeronautics Act in terms of scheduled and non-scheduled operations, and there are subsantial differences in the extent to which the various types of non-scheduled operations are subjected to regulation under the Act.

THE PROVISIONS OF THE ACT

The Civil Aeronautics Act provides two principal types of regulation: economic regulation provided for in Title IV[2] of the Act and safety regulation prescribed in Title VI.[3] The most significant feature of the economic regulation in these days of expanding operations is the requirement that no operation of a kind subject to the Act may be conducted without first obtaining a certificate of public convenience and necessity from the Civil Aeronautics Board authorizing the operation of the service.[4] In addition, tariffs must be filed with the Board;[5] passenger and cargo rates may be fixed by the Board when they are unreasonable or discriminatory;[6] reports may be required, and accounts and accounting practices may be prescribed by the Board;[7]

* General Counsel, Civil Aeronautics Board.

[1] 52 STAT. 977 (1938), as amended by 54 STAT. 735, 862, 1233, 1235 (1940), 56 STAT. 265, 300 (1942), 49 U. S. C. (1941) §401 *et seq.*

[2] CIVIL AERONAUTICS ACT OF 1938, §§401-416, 49 U. S. C. (1941) §§481-496. In the footnotes that follow the citation means 49 U. S. C.

[3] *Id.*, §§551-560. [4] *Id.*, §481. [5] *Id.*, §483. [6] *Id.*, §§484, 642. [7] *Id.*, §487.

consolidations, mergers, or acquisitions of control involving an air carrier must be approved by the Board;[8] interlocking relationships involving air carriers and certain other types of companies are subject to the Board's approval;[9] and some agreements between carriers must be filed with the Board.[10] In the safety field the Board prescribes air traffic rules and other safety standards and regulations,[11] and provision is made for the licensing of pilots and other airmen,[12] the issuance of safety certificates for aircraft,[13] and the issuance of air carrier operating certificates.[14]

The economic sections of the Act appearing in Title IV are by their express terms made applicable to an "air carrier" and to "air transportation." "Air carrier" and "air transportation" are in turn defined by the Act as follows:

"'Air carrier' means any citizen of the United States who undertakes . . . to engage in air transportation. . . ."[15]

"'Air transportation' means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."[16]

"'Interstate air transportation,' 'overseas air transportation,' and 'foreign air transportation,' respectively, mean the carriage by aircraft of persons or property *as a common carrier for compensation or hire or the carriage of mail by aircraft,* in commerce between [specified areas]." (Italics supplied.)[17]

As a result of these definitions only two types of operations are covered by the economic regulation in Title IV of the Act, i.e., (1) operations "as a common carrier for compensatoin or hire" and (2) operations involving the carriage of mail.[18]

commerce as defined in the Act. *Id.* §401(21).

As to such operations, the requirements relating to certificates of public convenience and necessity, the filing of tariffs, the fixing of rates, etc., apply under the statutory language.

On the other hand, the application of the provisions of Title VI of the Act dealing with safety regulation is, with two exceptions, governed by a completely different set of statutory definitions.[19] In general, the safety provisions apply to any aircraft, airman, or flight of aircraft. However, there are two special safety requirements which are imposed by the Act only upon an "air carrier" as heretofore defined. Thus an "air carrier" must secure an air carrier operating certificate from the Administrator of Civil Aeronautics, who issues such a certificate only if he finds that the carrier "is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this Act and the rules, regulations, and standards prescribed thereunder."[20] An "air carrier" also must comply with special safety regulations authorized by the Act with respect to overhaul and maintenance procedures.[21]

[8] *Id.*, §488. [9] *Id.*, §489. [10] *Id.*, §492. [11] *Id.*, § 551. [12] *Id.*, §552.
[13] *Id.*, §553. [14] *Id.*, §554. [15] *Id.*, §401(2). [16] *Id.*, §401(10). [17] *Id.*, §401(21).
[18] Subject, of course, to the further limitation that the operations must be in interstate or foreign
[19] See *id.*, §§401(3), 401(20).
[20] *Id.*, §554(b). This certificate is not the same as the certificate of public convenience and necessity. The latter is issued by the Civil Aeronautics Board on the basis of economic considerations.
[21] *Id.*, §555.

One related provision of the Act should be noted. The last sentence of Section 401(f) of the Act provides:

"Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board."[22]

This section has been construed to refer to air carriers holding certificates of public convenience and necessity from the Board. The Board has prescribed no regulations under this section, except an emergency regulation which during the war required certificated air carriers to secure the Board's approval before performing any charter trip or other special service, but the section has been construed to permit certificated carrier to operate charter trips and special services without the promulgation of a Board regulation.

The statutory pattern is, therefore, that the point of primary significance in determining the extent to which a commercial transport operation is subject to the regulatory provisions of the Civil Aeronautics Act is whether the operation is a "common carrier" service or a service on which mail is carried. For operations not having either of these characteristics, no economic regulation, and less comprehensive safety regulation, is provided under the statutes. The Board, however, by a regulation in the form of an exemption order, has modified this statutory pattern for the time being.

THE NON-SCHEDULED EXEMPTION ORDER

The Board, by an exercise of its exemption powers,[23] has injected into the regulatory plan the concept of scheduled and non-scheduled operations. The character of an operation as scheduled or non-scheduled is given a legal significance at the present time by reason of Section 292.1 of the Economic Regulations issued by the Board.[24] This regulation, adopted immediately after the enactment of the Civil Aeronautics Act, exempts all non-scheduled operations from the provisions of Title IV of the Act.[25]

The regulation provides, in part, as follows:

"(a) Until the Board shall adopt further rules, regulations or orders with respect to such matter, every air carrier which engages solely in non-scheduled operations shall be exempt from the provisions of section 401 and all other provisions of Title IV of the Civil Aeronautics Act of 1938 (except as provided in paragraph (b) of this section). . . ."[26]

It will be noted that an exception is made to the exemption in paragraph (b) of the regulation. This exception reads as follows:

[22] *Id.*, §481(f). [23] *Id.*, §496(b).

[24] 3 FED. REG. 2886 (1938) as amended 5 FED. REG. 3946 (1940), 14 CODE FED. REGS. (CUM. SUPP.) §292-1.

[25] Title IV contains virtually all of the substantive powers of the Board with respect to regulation of an economic character. The exemption has been construed to include the Board's power to fix passenger and cargo rates, although the procedural provisions of the Act describing the Board's powers in this respect are in Title X, sec. 1002, of the Act. 49 U. S. C. (1941) §642.

[26] 3 FED. REG. 2886 (1938) as amended 5 FED. REG. 3946 (1940), 14 CODE FED. REGS. (CUM. SUPP.) §292.1(a).

"(b) The exemptions provided by this section shall not be applicable to the provisions of subsection (1) of section 401 of the Act or to the reporting requirements of section 407 of the Act; provided that no provisions of any rule, regulation, or order that may be adopted by the Board requiring reports pursuant to section 407 of the Act shall be deemed applicable to any non-scheduled operator unless such rule, regulation, or order expressly provides that such provision is to be applicable to air carriers who are engaged exclusively in non-scheduled operations."[27]

As a result of this exemption, a broad field of operations, which otherwise under the Act would be subject to regulation as "common carrier services," has been freed from economic regulation during the entire period of regulation under the Civil Aeronautics Act. This freedom from regulation is temporary, of course, in the sense that at any time the Board could, by repealing the exemption, subject to economic regulation such of these non-scheduled operations as have a common carrier status or engage in the carriage of mail. For the time being, however, operations which are non-scheduled within the meaning of the regulation may be inaugurated without securing a certificate of public convenience and necessity from the Board, and need not comply with other requirements relating to tariffs, rates, etc.

The effect of Section 292.1 of the regulations on safety regulation is quite different. The Act gives the Board no power to exempt carriers from the safety provisions of the statute. Therefore, the provisions of the Act which require, for example, that no air carrier shall operate without an air carrier operating certificate continue to apply in full force to all common carrier operations. Up to now this requirement has not been enforced in practice with respect to non-scheduled operations. However, the Board recently has proposed a new Part to the safety regulations[28] which would lay down the standards for the issuance of air carrier operating certificates to non-scheduled carriers, and prescribe special operations rules for non-scheduled services. When this new Part, or some modified version of it, is promulgated, all non-scheduled common carrier operations would be required to comply with it even though the exemption in Section 292.1 of the regulations should continue in effect.

THE MEANING OF "NON-SCHEDULED"

In exempting non-scheduled operations from economic regulation the Board included in Section 292.1 of the regulation a definition of "non-scheduled." This definition is as follows:

"Within the meaning of this section any operation shall be deemed to be non-scheduled if the air carrier does not hold out to the public by advertisement or otherwise that it will operate one or more airplanes between any designated points regularly or with a reasonable degree of regularity upon which ariplane or airplanes it will accept for trans-

[27] *Id.*, §292.1(b). Section 401(1) of the Act contains provisions relating to wages, hours, and working conditions of carrier personnel and section 407 deals with accounts and reports. 49 U. S. C. (1941) §§481(1), 487.

[28] Civil Aeronautics Board, Civil Air Regulations Draft Release No. 58, August 11, 1945.

portation, for compensation or hire, such members of the public as may apply therefor or such express or other property as the public may offer."[29]

Whether an operation receives the benefit of the exemption depends upon whether it falls within this language. While the definition simplifies to some extent the application of the regulation, the terms of the definition still are general and its application to particular cases remains a difficult problem. Unfortunately, the Board has not issued any formal decision construing the definition. However, the Board has informally investigated a number of cases of operations purportedly being conducted on a non-scheduled basis and some indication of the Board's views can be drawn from these.

One such case involved an operator who, in addition to offering general "charter services," advertised that he would render service over a specified route and that the planes "will leave any time, day or night." The operator made provisions so that transportation could be arranged for through hotel transportation desks, travel agents, and airline ticket offices in the area, but the agents had no instructions concerning schedules other than that trips would be operated at any time. During the period of 54 days under investigation the operator made 101 trips over the one route. The trips departed at varying times of the day and no pattern or uniformity in times of departures and arrivals was apparent. Although the departure times were irregular, the service itself was regular in the sense that it was held out to the public as being continuously available and was actually performed on what was on the average a daily basis. On the other hand, small aircraft were operated and there was no evidence that the departure of individual trips were planned until the prospective passenger contacted the operator or its agents and arranged for the transportation. In this case the Board took no further action against the operator after completion of the informal investigation.

An example of the opposite result is found in a case involving the following facts: This operator also furnished service over a fixed route. There was no formal advertising nor were timetables issued, but considerable initial publicity of a "news item" character was given to the service. Hotel reservation desks which were made agents for the sale of transportation were advised that departures would be around a certain time in the morning of specified days of the week and apparently were free to disclose this information to prospective passengers. Similar information concerning departures was transmitted to some companies whose employees were expected to be large sources of traffic. There was evidence that the departure times were varied somewhat from day to day by a formula fixed in advance. In actual operations, one trip was made daily with a morning departure time which, while varying somewhat from day to day, apparently conformed generally to the prearranged formula. In this case, the Board advised the operator informally that in the Board's opinion the operation was not within the non-scheduled exemption.

[29] 3 FED. REG. 2886 (1938) as amended 5 FED. REG. 3946 (1940), 14 CODE FED. REGS. (CUM. SUPP.) §292.1(a).

Another case involving the construction of the non-scheduled exemption is now pending before the Board in a formal proceeding.[30] With respect to the applicability of the exemption, this case would appear to fall somewhere between the two cases described above. The trips were operated over a fixed route and the operator planned in advance to operate a daily round trip and also determined in advance the hours at which the trips would be operated. On the other hand, the operator's employees were instructed as follows:

"You may state an exact departure and arrival time for any special flight about which inquiry is made. In answer to general inquiries about schedules, however, you must state that arrival and departure times are approximate. You must explain that the actual departure time for each trip will be indicated on the passenger's ticket and he will be given a fixed departure time, therefore, only for his own trip."

The operator's press releases and advertising announced only that a service would be operated over the route, no reference being made to the fact that the trips were to be on a daily basis nor to the times of departure. However, in some manner various newspapers secured the information that the service would be operated daily and this fact was published by them in news items, which in at least one instance included a statement of actual departure times. In view of some vagueness in the instructions to employees quoted above and conflicts in testimony of witnesses, there is uncertainty about the manner in which inquiries from prospective passengers were handled in practice. For example, the instructions could be construed as not prohibiting advice that trips were operated daily, and if any inquiry were made as to transportation for a particular day in the future the instructions might sanction advising that trips departed in the afternoon or at approximately a specified time. There is evidence that advice of this kind actually was given to prospective passengers on occasions. Operations were conducted on a daily basis with a 14 passenger plane in approximate conformity to the scheduled departure times, except for cancellations due to weather, and transportation was sold by individual seats as distinguished from a "charter" of the whole plane.

Inasmuch as this case is pending, no attempt will be made to reach any conclusion on it here. The operator contends on brief in the case that under the regulation it is the "holding out" to the public of regular services that removes an operation from the non-scheduled category, and denies that there was any such holding out here. The operator's contention that the definition of non-scheduled operations is based upon the nature of the holding out by the operator is sound as a general principle and, accordingly, the fact that the service may have been operated in fact on a regularly scheduled basis is not controlling. On the critical question whether the service was held out to the public in the sense intended by the Board's definition of non-scheduled a number of questions of principle are suggested by the case, e.g., (1) what is the effect of newspaper publicity concerning times of departure if it is not intentionally promoted by the operator, (2) can the

[30] In the Matter of Certain Activities of Trans-Marine Airlines, Inc., C. A. B. Docket No. 1967.

operator, with only the condition precedent that the prospective passengers request information concerning trips on a day specified by the passenger, advise passengers in advance of purchasing transportation of an exact, or even approximate, time of a departure already determined upon by the operator, (3) where the service is planned for a period in advance on a daily basis may not any practicable response to inquiries of prospective passengers constitute the holding out of a regular, and therefore a scheduled, service, (4) where the service is operated daily for a substantial period of time at approximately the same times of departure does the general knowledge acquired by the public of the regularity of the service establish the holding out to the public referred to in the regulation, and (5) is the holding out through advertising or answers to general inquiries that a service is on a daily, or similarly recurrent basis sufficient to remove the service from the exemption. The Board's decision should furnish answers to some of the questions raised by this case.

PROPOSALS FOR MODIFICATION OF THE NON-SCHEDULED EXEMPTION

It is apparent that, without regard to their economic soundness, the exemption and the definition of non-scheduled are inadequate. It is extremely difficult now for an operator to determine whether his plans will fall within the exemption and this uncertainty should be minimized to the extent that it is feasible. From the policy point of view the exemption also needs reexamination. It was adopted seven years ago in the early days of economic regulation, probably more as a means of postponing a problem which could not be handled due to the press of other activities required by the Act than as a reasoned economic policy. These considerations led the Board to institute on July 26, 1944, an investigation into the general problem of the desirability of revising or terminating Section 292.1.[31] Public hearings have been held in this investigation and a report by the Board's examiners who presided at the hearing has been issued.[32]

The report of the examiners recommends the repeal of Section 292.1 and suggests a new exemption for certain types of operations based upon a proposed new classification of carriers. The examiners' recommendation, in effect, would exempt from economic regulation all services transporting persons and property for hire with three limitations—the limitations being (1) that the service must consist of trips originating or terminating at a "principal place of business" of the operator, (2) that not more than ten trips per month could be operated between points between which "reasonably direct service" is available under existing certificates of public convenience and necessity, and (3) that the services must be those of a carrier exclusively engaged in operations falling within the first two limitations. This recommendation is in one respect considerably broader than the present exemption in that the proposal would exempt even scheduled operations where reasonably direct certificated services were not available. On the other hand, the limitation recommended with respect to operations between points between which

[31] In the Matter of Investigation of Non-scheduled Air Services, C. A. B. Docket No. 1501.
[32] *Id.*, Report of Examiners, August 22, 1945.

certificated service is available would retain, in such a case, the idea of a distinction between scheduled and non-scheduled operations but would redefine non-scheduled operations in terms of a maximum number of trips permissible during a month.

The recommendation of the examiners in this proceeding has not yet been considered by the Board. Any future exemption could, of course, be designed to extend to an entirely different classification of operations than are now exempted, or to exempt different classes of operations from Title IV of the Act in varying degrees. Disposition of the problem necessarily will depend on the views the Board takes concerning the economic need for regulation of the various types of operations subject to the Act. A number of different proposals have been made with respect to the treatment of the exemption order, which reflect varying views as to the directions in which economic regulation is advisable or undesirable: the examiners propose that what can be roughly described as fixed base operations be exempted; others have suggested that what is needed is an exemption for local services defined in terms of services which do not operate in excess of some specified distance or which are operated with aircraft having less than a specified capacity; it has been proposed that at least some specialized services such as the transportation of household goods be exempted; and, of course, there also are available the alternatives of removing all exemption and thereby bringing under economic regulation all common carrier operations or of continuing to exempt non-scheduled operations as is now the case. It appears probable that even though no change is made in the general policy of the exemption the Board in any event will modify the present regulation to the extent of defining more precisely the term "non-scheduled."

THE MEANING OF "COMMON CARRIER"

The concept of "common carrier" is a basic part of the Act. The general tests to be applied in determining whether an operation is that of a common carrier are well established by a great body of law applicable to surface transportation. Although the cases involving the status of air carriage have been relatively few, there has been a sufficient number to indicate clearly that the courts have applied the same general tests of status in this field of transportation as they have applied in other fields.[33] While the general principles are clear, the application of these principles to the variety of factual situations that can be presented is difficult.

A common carrier is generally defined as one who, as a regular business, undertakes for hire to carry for such persons as may apply so long as capacity is available.[34] No difficulty is presented in applying this principle to the case of estab-

[33] Allison v. Standard Air Lines, 1930 U. S. Av. R. 292 (U. S. D. C., S. D., Cal. 1930), *aff'd.* on other grounds 65 F. (2d) 668 (C. C. A. 9th, 1933); Law v. Transcontinental Air Transport (not officially reported), 1931 U. S. Av. R. 205 (U. S. D. C., E. D., Pa. 1931); Smith v. O'Donnell, 5 P. (2d) 690 (App. 2d D. Cal. 1931), *aff'd.* 215 Cal. 714, 12 P. (2d) 933 (1932); Ziser v. Colonial Western Airlines, 10 N. J. Misc. 1118, 162 Atl. 591 (1932); Conklin v. Canadian Colonial Airways, 242 App. Div. 625 (1934), *aff'd.* 266 N. Y. 244, 194 N. E. 692 (1935); McCusker v. Curtiss-Wright Flying Service, 269 Ill. App. 502 (1933); Curtiss-Wright Flying Service v. Glose, 66 F. (2d) 710 (C. C. A. 3d, 1933), *cert. den.* 290 U. S. 696 (1933).

[34] 13 C. J. S., *Carriers*, sec. 3.

lished airlines running on schedule between fixed termini selling transportation in the form of tickets for individual seats and carrying within the capacity of the plane all persons who desire transportation. In such instances, the courts have readily classified these as common carriers.[35]

Inquiries received by the Board indicate that as expressed by persons planning operations the problem of determining the common carrier status of aircraft operations most frequently takes the form of one of the following questions: (1) can a non-scheduled operation or one without fixed termini be a common carrier service, (2) can a charter service be so operated as to be a common carrier service, and (3) how many and what sort of special contracts for transportation convert a so-called contract service into a common carrier service.

As to the first point, it seems clear that the fact that an operation is not scheduled is not controlling as to its common carrier status nor is the fact that the operation is not between fixed termini.[36] Although some judicial decisions have given these factors some weight in connection with other circumstances surrounding an operation,[37] the concept of a common carrier service as one held out to the public would not justify giving any greater force than this to the lack of schedules or termini. It should be reemphasized here that the failure of the Board to apply economic regulation to non-scheduled operators in the past has not been due to any determination by the Board that such operators are not common carriers.

The greatest volume of non-scheduled commercial air transport operations in the past appears to have been in the form of so-called charter services. The term charter services is used here to refer to those operations typically held out as "service to any place at any time" and involving the operation of trips only upon the making of a special arrangement on the occasion of each trip by a single individual or single group. There has been a tendency to assume too readily that operations of this kind cannot have a common carrier status. To some extent, this assumption has been based on the idea that the arrangement is in effect, the lease of the aircraft by the operator rather than a transaction involving the furnishing of transportation to the passenger or shipper. But, in fact, this need not necessarily be the case in arrangements of this kind.

In the maritime field, for example, it has been held that a charter of a ship is not technically a lease of the vessel nor does the owner lose his status as a carrier unless rather complete control of the vessel is transferred under the charter agreement; in the absence of such a surrender of control the so-called charter is simply a

[35] Allison v. Standard Air Lines, 1930 U. S. Av. R. 292 (U. S. D. C., S. D., Cal. 1930), *aff'd.* 65 F. (2d) 668 (C. C. A. 9th, 1933); Law v. Transcontinental Air Transport (not officially reported), 1931 U. S. Av. R. 205 (U. S. D. C., E. D., Pa. 1931); Conklin v. Canadian Colonial Airways, 242 App. Div. 625, 271 N. Y. Supp. 1107 (1934), *aff'd.* 266 N. Y. 244, 194 N. E. 692 (1935); cited *supra* note 33.

[36] Ziser v. Colonial Western Airways, 10 N. J. Misc. 1118, 162 Atl. 591 (1932); Claypool v. Lightning Delivery Co., 38 Ariz. 262, 299 Pac. 126 (1931); Smith v. O'Donnell, 5 P. (2d) 690 (App. 2d D. Cal. 1931), *aff'd.* 215 Cal. 714, 12 P. (2d) 933 (1933); Cushing v. White, 101 Wash. 172, 172 Pac. 229 (1918); Carlton v. Boudar, 118 Va. 521, 88 S. E. 174 (1916); McCusker v. Curtiss-Wright Flying Service, 269 Ill. App. 502 (1933).

[37] Beatrice Creamery Co. v. Fisher, 291 Ill. App. 495, 10 N. E. (2d) 220 (1937).

contract for transportation.[38] The Interstate Commerce Commission has made a similar distinction in applying the provisions of the Motor Carrier Act to charter operations of motor vehicles,[39] and has held in many cases that services analogous to the typical aviation charter services have a common carrier status and must be certificated as such where they are held out as available to the public.[40] Judicial decisions also have held that taxi services can be common carrier services even where the passenger is entitled to the exclusive use of the vehicle[41] and that charter bus operations can have a similar status.[42] Of more direct significance to the aviation field, is the fact that it has already been held in one decision of a court that what, from the facts of the case, appears to have been a typical aviation charter operation was in law a common carrier service.[43]

It is not intended to generalize from this that all charter services are common carrier services. The answer in each case must depend upon whether the arrangements made are contracts for transportation and whether, as in the case of other types of service, the service is being held out as available to the public generally.[44] Whether such a service is so held out as to be a common carrier service would appear to present a problem generally similar to that presented by so-called contract services.

Considerable interest has been shown in the operation of air services for the carriage of cargo under special contract. In the case of these operations, as in charter services, the plans of many operators are predicated on the theory that the fact that both types of service are performed under special arrangements with the passenger or shipper will prevent the operations from taking a common carrier status and thereby leave them free from economic regulation under the Civil Aeronautics Act. However, the mere existence of a special contract or contracts for the transportation rendered is not, as a matter of legal principle, controlling as to the common carrier status of an operation.[45] Transportation by a common carrier also involves a contract. The significance of an operator's furnishing transportation only under special contracts made with each passenger or shipper is that such a

[38] United States v. Hvoslef, 237 U. S. 1 (1915); Boston Elevated Ry. Co. v. Malley, 288 Fed. 864 (D. Mass. 1923).

[39] Tanner Motor Livery, Ltd., Com. Car. Application, 32 M. C. C. 387 (1942); U-Drive-It Co. of Pennsylvania, Inc., Com. Car. Application, 23 M. C. C. 799 (1940).

[40] Blue & Grey Sight Seeing Tours, Com. Car. Application, 8 M. C. C. 124 (1938); Joseph Newman, Com. Car. Application, 17 M. C. C. 101 (1939); Barrows, Com. Car. Application, 19 M. C. C. 179 (1939); Peters, Com. Car. Application, 23 M. C. C. 611 (1940); Liederbach, Com. Car. Application, 41 M. C. C. 595 (1942).

[41] Terminal Taxicab Co. v. Kutz, 241 U. S. 252 (1916); Cushing v. White, 101 Wash. 172, 172 Pac. 229 (1918); Carlton v. Boudar, 118 Va. 521, 88 S. E. 174 (1916).

[42] Fordham Bus Corporation v. United States, 41 F. Supp. 712 (S.D., N. Y., 1941).

[43] McCusker v. Curtiss-Wright Flying Service, 269 Ill. App. 502 (1933).

[44] Terminal Taxicab Co. v. Kutz, 241 U. S. 252 (1916); Langer v. Lukens, 26 F. (2d) 855 (C. C. A. 9th, 1928).

[45] Smitherman v. Mansfield Lumber Co., 6 F. (2d) 29 (W. D., Ark. 1925); McKay v. Public Utilities Commission, 104 Colo. 402, 91 P. (2d) 965 (1939); Gornish v. Public Utilities Commission, 134 Pa. S. 565, 4 A. (2d) 569 (1939); Breuer v. Public Utilities Commission, 118 Ohio St. 95, 160 N. E. 623 (1928); State v. Washington Tug & Barge Co., 140 Wash. 613, 250 Pac. 49 (1926).

practice tends to negative a holding out of the service to the public generally.[46] On the other hand, if, from other circumstances surrounding the operation, there is an apparent willingness to serve anyone who requests the service within the limits of available equipment, the operation would be a common carrier service even though performed under special contracts made prior to the transportation,[47] and the fact that on occasions business was refused would not necessarily prevent the operation from being that of a common carrier.[48]

The Interstate Commerce Commission has attempted to work out administratively a more concrete specification of the difference between common carrier and contract operations under the Motor Carrier Act.[49] The Commission holds that:

"We find, therefore, that from and after the effective date of the order hereinafter entered, all contract carriers of property by motor vehicle, as defined in section 203(a)(15) of the act, shall transport under contracts or agreements which shall be in writing, which shall provide for transportation for a particular shipper or shippers, which shall be bilateral and impose specific obligations upon both carrier and shipper or shippers, which shall cover a series of shipments during a stated period of time in contrast to contracts of carriage governing individual shipments, and copies of which shall be preserved by the carriers parties thereto so long as the contracts or agreements are in force and for at least one year thereafter."[50]

In reaching this conclusion, the Commission stated that:

"The requirement that they be bilateral and cover a series of shipments over a period of time is necessary, if there is to be any practical and effective means, for the future, of preventing alleged contract carriers from trespassing on the field of common carriage."[51]

This view of the Commission has been approved by at least one judicial decision.[52] The Commission's action suggests one course which the Board might take in defining common carrier operations by aircraft in the field of cargo carriage.

The question has been raised frequently as to whether the number of contracts made by an operator has significance in determining his status. The Interstate Commerce Commission has indicated that the number of contracts which a carrier may have is one of the secondary considerations to be looked at in determining whether it is a common or a contract carrier.[53] On the other hand, there are some judicial decisions holding that an operator was not a common carrier even though a large number of contracts had been made, but in these cases the fact that the services were of a specialized character may have been responsible for the result.[54]

[46] State v. Carlson, 217 Ia. 854, 251 N. W. 160 (1933); Terminal Taxicab Co. v. Kutz, 241 U. S. 252 (1916).

[47] See cases cited *supra* note 45. [48] *Ibid.*

[49] Contracts of Contract Carriers, 1 M. C. C. 628 (1937).

[50] *Id.* at 632. [51] *Id.* at 633.

[52] See, Fordham Bus Corp. v. United States, 41 F. Supp. 712, 718 (S. D. N. Y. 1941).

[53] Craig Contract Car. Application, 31 M. C. C. 705 (1941).

[54] Film Transport Co. v. Public Utilities Com., 17 F. (2d) 857 (E. D. Mich., 1927); Columbus-Cinn. Trucking Co. v. Public Utilities Com., 141 Ohio St. 228, 47 N. E. (2d) 623.

In view of the legal definition of a common carrier, it does not seem that the number of contracts made by an operator should be given any great significance in resolving the fundamental question as to whether he is holding out the service to the public—although the fact that a large number of contracts was made would be some indication that the service was being so held out. The primary question is whether the service is being held out to the public and not what the results of the holding out are. While the Board has not made any recent survey of the so-called charter operations now being carried on, such general information as it has would indicate that most of them are being held out to the general public in a fashion which makes them common carrier services. No large number of operations for the carriage of cargo under contract has yet been inaugurated and it is not possible to generalize as to the status of these operations.

There are several special types of service which should be commented on briefly. The Board has received a number of informal inquiries from retail stores, mail order houses, producers associations, etc., as to the status of proposals to use aircraft in the delivery of goods sold to customers or in the transport of goods for the purpose of subsequent sale. In a number of judicial decisions it has been held that whether transportation in connection with a sale transaction is carriage for hire depends upon whether title to the cargo is held by the person operating the vehicle.[55] If title is held by the operator, no transportation for anyone other than the operator is involved and, of course, the movement is not common carriage;[56] if the operator does not hold title and the service is available to the public, the contrary result is reached.[57] To leave the problem rest here, however, would be an over-simplification of it, inasmuch as there are indications in other authorities that additional factors enter into this type of case.

The Interstate Commerce Commission has held in cases of this kind that a seller using motor vehicles to deliver goods sold by him is generally a "private carrier" under the Motor Carrier Act where the operations are incidental to and in furtherance of the business in which the seller is engaged,[58] and even though the seller adds a transportation charge to the price of the goods sold.[59] However, the Commission holds that under some circumstances motor vehicle operations in connection with sale transactions may be common or contract carrier operations even though title to the cargo is held by the operator.[60] The test, says the Commission, is whether the transportation:

[55] Interstate Commerce Commission v. Clayton, 127 F. (2d) 967 (C. C. A. 10th, 1942); Campbell River Mills Co. v. Chic. M. St. P. & P. R. Co., 42 F. (2d) 775 (W. D. Wash. 1930); Bay v. Merrill & Ring Lumber Co., 211 F. 717 (W. D. Wash. 1914); Allaman v. Public Utility Commission, 149 Pa. S. 353, 27 A. (2d) 516 (1942); Weller v. Kolb's Bakery & Dairy, 4 A. (2d) 130 (Ct. of App. Md. 1939).

[56] *Ibid.*

[57] West v. Tidewater Express Lines, 168 Md. 581, 179 Atl. 176 (1935).

[58] Congoleum-Nairn, Inc., Contract Car. Application, 2 M. C. C. 237 (1937); Shafer, Com. Car. Application, 3 M. C. C. 347 (1937); Jackson, Com. Carrier Application, 7 M. C. C. 388 (1938); Swanson, Contract Car. Application, 12 M. C. C. 516 (1939); Woitishek, Com. Car. Application, 42 M. C. C. 193 (1943).

[59] Swanson, Contract Car. Application, 12 M. C. C. 516 (1939).

[60] Campbell, Com. Car. Application, 6 M. C. C. 277 (1938); Conklin and Caton, Com. Car Application, 20 M. C. C. 469 (1939); Roberts, Extension of Operations, 28 M. C. C. 238 (1941).

". . . is transportation which is supplied with a purpose to profit from the effort as distinguished from a purpose merely to make good or recover the cost of transportation furnished in the furtherance of some other primary business or transaction."[61]

This distinction has been followed in judicial decisions where it is said that ownership of the cargo transported is not the test of whether carriage for hire is present in a case, but that the primary test is whether the transportation is merely incidental to the business of selling or is a major enterprise in and of itself.[62]

In view of the great variety of arrangements which can be made involving sales coupled with transportation, it would seem advisable in order to prevent evasion of the Act for the Board to adopt principles in this connection similar to those followed by the Interstate Commerce Commission.

Another special type of service which has been proposed on occasions is the so-called "flyaway service," i.e., the flying of aircraft from the seller of the aircraft to the purchaser. Where this is done by the seller, who retains title, no transportation for hire would appear to be involved. However, the Interstate Commerce Commission has held that similar motor vehicle operations conducted by persons other than the buyer or seller of the vehicle, performed for compensation by persons holding themselves out to perform such service as a business and not as a casual or occasional transportation, is the transporation of property by motor vehicle.[63] The Commission's reasoning appears to be based upon the conclusion that the operations in question are transportation. The Civil Aeronautics Act defines "air transportation" in terms of "the carriage by aircraft of persons or property" and the definitions of carriers by motor vehicle in the Motor Carrier Act are stated in similar language. The quoted phrase suggests that Congress may have had in mind only the transportation of cargo other than the aircraft itself, in which event aircraft "flyaway services" would not be subject to Title IV of the Act. Although the Board has made no ruling on this point, it is not certain that it need follow the Interstate Commerce Commission's precedent.

As is the case in the application of the definition of the term "non-scheduled," the determination of the common carrier status of aircraft operations in particular cases is most uncertain. Some consideration has been given to the possibility of securing the promulgation by the Board of a regulation which would set out the Board's views as to the point at which various kinds of operations became those of a common carrier. Such a regulation could not be conclusive and would be subject to modification as a result of later proceedings before the Board or litigation in the courts, but it would at least provide a basis upon which operators could proceed with their plans with more assurance of their future fate than they now have. Alternatively, it might be feasible to establish a procedure for the issuance of in-

[61] Woitishek, Com. Car. Application, 42 M. C. C. 193, 201 (1943). This case contains a very complete review of the problem as it has arisen under the Motor Carrier Act.

[62] Interstate Commerce Commission v. Clayton, 127 F. (2d) 967 (C. C. A. 10th, 1942); A. W. Stickle Co. v. Interstate Commerce Commission, 128 F. (2d) 155 (C. C. A. 10th, 1942).

[63] Wartena, Inc., Com. Car. Application, 4 M. C. C. 619 (1938); Fleming, Com. Car. Application, 8 M. C. C. 469 (1938); Saber, Inc., Ext. of Operations, 23 M. C. C. 80 (1940).

formal opinions by the Board concerning the status of operations upon the submission of an adequate statement of fact, although such opinions would not be binding on the Board in a legal sense.

The common carrier status of an operation, as has been pointed out, is now important because only common carrier operations are subject to economic regulation under existing law. However, legislation is now pending in Congress which would provide for the regulation of those commercial air transport operations for hire which are not common carrier services.[64] The general outline of the regulation proposed by this legislation is similar to that now provided in the Civil Aeronautics Act for common carriers. Authority to operate in the form of licenses would be required. Provision would be made for the filing of tariffs showing minimum rates and the Board would be given power to fix minimum rates in the event that existing rates were unreasonable. A broad authority would be given under these proposals for the Board to exempt operations from regulation where it finds that the public interest requires it.

INTERNATIONAL SERVICES

What has heretofore been said concerning the application of the Civil Aeronautics Act is generally true both with respect to commercial operations within the United States and operations between the United States and foreign territories by United States citizens. In international operations common carriers who are citizens of the United States are required by the statute to secure certificates of public convenience and necessity from the Board, file tariffs, comply with all requirements of Title IV,[65] and secure air carrier operating certificates; and Section 292.1 of the regulations exempts from the application of Title IV of the Act such operations as are within its definition of "non-scheduled." However, the necessity of securing operating rights from foreign countries injects additional legal aspects into international operations. This subject could be fully developed only by a more extensive treatment than is possible in this paper; but a general outline of the current international law is necessary for a complete picture of the status of non-scheduled operations.

Prior to the International Aviation Conference held in the latter part of 1944 at Chicago, the United States entered into a number of bilateral air navigation agreements with foreign countries.[66] The basic right exchanged by these agreements was that of "liberty of passage" to the aircraft of the parties. However, all of these agreements contain the exception, usually in the following form, that "the establishment and operation of regular air routes" shall be subject to the prior con-

[64] H. R. 674 and S. 1, 79th Cong., 1st Sess. (1945).

[65] However, the Board's power to fix rates for the transportation of persons and cargo between the United States and foreign territories is limited to the removal of unreasonable discriminations. See secs. 404, 1002(d) and (f) of the Act, 49 U. S. C. (1941) §§484, 642(d) and (f).

[66] Department of State, Executive Agreement Series Nos. 24 (Italy), 38 (Germany), 47 (Sweden), 50 (Norway), 54 (Union of So. Africa), 58 (Denmark), 76 (United Kingdom), 110 (Ireland), 129 (Canada), 152 (France), 166 (Liberia).

sent of the party whose territory is touched by the operation.[67] Whether these agreements extend operating rights to services which are not on a scheduled basis depends upon the construction placed upon the phrase "regular air route." It would appear arguable that a non-scheduled service which operated with considerable frequency over a particular route would fall within the exception and therefore would be required to secure the same sort of permit from the foreign country that is required of a scheduled operation. The construction of the agreements in this respect does not appear to have been established yet in international practice. The United States also is a party to the so-called Havana Convention on Commercial Aviation between the United States and other American Republics.[68] This agreement provides for "freedom of innocent passage . . . to the private aircraft" of the contracting states, without making any express exceptions. In practice, however, the parties have required prior consent at least for the operation of regularly scheduled air transport services.

Two of the international agreements worked out at the recent Chicago Aviation Conference are already in effect as between the United States and certain other countries, i.e., the "International Air Services Transit Agreement" and the "International Air Transport Agreement,"[69] but these two agreements relate only to rights for "scheduled international air services."[70] In addition to these agreements an aviation convention was drafted at Chicago. This Convention contains express provisions dealing with the conditions under which non-scheduled international air services may be operated, but will not be effective until ratified by at least twenty-six countries. Article 5 of the Convention[71] grants to all civil aircraft the right to make non-stop flights and non-traffic stops. In addition, aircraft engaged in the carriage of traffic for hire "on other than scheduled international air services" are granted the right to take on or discharge traffic in the territory of the nations ratifying the Convention "subject to the right of any state where such embarkation or discharge takes place to impose such regulations, conditions, or limitations as it may consider desirable."[72] Since this Convention is not yet in effect rights for the operation of international non-scheduled services by United States operators now must depend upon the provisions of existing bilateral agreements and those of the Havana Convention, or upon securing special rights for the particular services.

Operations into the United States by citizens of a foreign country are made subject by the Act to the regulation provided for "common carriers,"[73] but where

[67] Other forms of the exception require prior consent for the operation of "[a] regular air route or service" (United Kingdom), "a regular air route or air transport service" (France), and of "regular scheduled services" (Liberia).

[68] 47 STAT. (Part 2) 1901, Department of State, Treaty Series No. 840.

[69] INTERNATIONAL CIVIL AVIATION CONFERENCE, FINAL ACT AND RELATED DOCUMENTS, issued by the Department of State (1945) 87-95.

[70] International Air Services Transit Agreement, Art. I, *id.* at 87; International Air Transport Agreement, Art. I, *id.* at 91.

[71] INTERNATIONAL CIVIL AVIATION CONFERENCE, FINAL ACT AND RELATED DOCUMENTS, *supra* note 69, at 60.

[72] *Ibid.*

[73] There are, however, some differences in the details of regulation as applied to United States air carriers and as applied to foreign air carriers.

their operations are not on a common carrier basis, they must secure a foreign aircraft permit from the Civil Aeronautics Administration under the provisions of Section 6(c) of the Air Commerce Act of 1926;[74] the last permit being a requirement which is not imposed upon citizens of the United States. Section 292.1 of the economic regulations, exempting non-scheduled operations from Title IV of the Act, does not apply to citizens of a foreign country.

CONCLUSION

To summarize—the current regulatory pattern is that (1) all non-scheduled operations as defined by the Board, performed by United States carriers, are, at least temporarily, free from regulation under Title IV of the Act (except with respect to Section 401(1) and in some respects Section 407), (2) such non-scheduled operations as are common carrier services are required by the Act to secure an air carrier operating certificate and comply with other safety regulations, the non-scheduled exemption providing no relief from these requirements, and (3) in the event of a repeal of the Board's exemption order in Section 292.1 of the Economic Regulations, all common carrier operations, whether scheduled or non-scheduled, would be subject to the economic regulation provided by Title IV of the Act.

The development of regulatory policies and the legal principles of regulation is just getting under way with respect to non-scheduled commercial air transport operations. Many of the provisions of the Civil Aeronautics Act are patterned after those of the Motor Carrier Act and the type of non-scheduled transport operations feasible with aircraft are to a considerable extent analogous to those which have developed in the past with motor vehicles on the surface. Consequently, it can be expected that the problems which arise in this field of aviation regulation will be similar to those which have already been faced by the Interstate Commerce Commission in administering the provisions of the Motor Carrier Act. While it is not possible to predict how far the Board will follow the Commission's precedents, the decisions of the Commission in its field provide in any event a useful basis for considering the similar problems of non-scheduled aviation.

Of more immediate concern to the person who is planning at this time to engage in some sort of non-scheduled aviation operations is the fact that during the next few months it is likely that new developments affecting this field will arise out of the Board's consideration of the pending investigation of non-scheduled air services.

[74] 44 STAT. 572 (1926), as amended by 52 STAT. (1938) 1028, 54 STAT. 1235 (1940), 49 U. S. C. (1941) §176(c).

SOME ASPECTS OF AIR CARRIERS' LIABILITY

PAUL REIBER*

The crash of the Army B-25 bomber into the Empire State Building on Saturday morning last July killed ten occupants of the building and injured twenty-six others. It was spectacular, but it could have happened on a week-day with an 80 passenger Stratocruiser, the commercial version of the B-29, and ten times the gasoline load of the B-25. The need for an efficient method for compensating the persons injured is apparent. Likewise, there is a need for some limit to the potential liability of air carriers. One accident, conceivably without fault on the part of anyone, could wipe out the resources of some air carriers.[1]

The application of the common law rules of liability to such problems has given rise to much discussion[1a] and effort to adjust those rules. The problems faced by a passenger or person on the ground seeking recovery against an air carrier[2] and some of the proposals to facilitate such recovery can be discussed in relation to the extent of the air carrier's liability, and certain proposals to limit the amount of such liability. "Air carrier" will be used here to mean any person or corporation who engages in the carriage by aircraft of persons or property as a common carrier for compensation or hire. This will include carriers engaged solely in intrastate transportation.[3]

* A.B., 1935, Nebraska Wesleyan University; LL.B., 1940, Harvard Law School. Member, Massachusetts Bar. Attorney, Air Transport Association of America.

[1] Several accidents recently have illustrated how large the losses can be. On May 20, 1943, a B-24 Liberator crashed into a gas-holder in Chicago. The gas lost was valued at $15,000 and the holder cost $1,250,000 or more to replace. (July, 1943) 38 NAT'L FIRE PREV. ASS'N QU. 15. On March 6, 1945 a C-60 crashed into the doors of a hangar at flying speed. Eight men were killed, nine injured and the property damage was reported at $3,000,000. (April, 1945) 40 *id.* at 232. Only ten of the sixteen domestic air carriers reporting to the Civil Aeronautics Board in December 1944 reported assets of over $3,000,000.

[1a] In the thirteen volumes of the JOURNAL OF AIR LAW from 1930 through 1942 were at least fourteen major articles discussing some aspect of the liabilities of operators of aircraft.

[2] Many of the problems relating to the liability of operators of aircraft generally have been dealt with fully in the "Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation," 1941, prepared by the staff of the Civil Aeronautics Board, Edw. C. Sweeney, Attorney in charge of staff investigation. The Study is relied upon herein and will be cited as SWEENEY REPORT.

[3] Cf. "Air carrier" as defined in the Civil Aeronautics Act of 1938, as amended, which includes only those engaged in "air transportation" which, in turn, is defined as "interstate, overseas or foreign air transportation or the transportation of mail by aircraft," 52 STAT. 973 (1938), 49 U. S. C. (1941) §401, (2), (10) and (21). Legislation proposing changes usually deals also with the definition of passengers, survival of personal injury actions, limitations on time for bringing suit and liability with regard to property on the aircraft. These will not be discussed here.

I. WHEN CAN THE PLAINTIFF RECOVER FOR DAMAGE CAUSED BY AIR CARRIER AIRCRAFT?

A. *Recovery for damage on the surface of the earth*

There have been few decisions determining the liability of any aircraft operator for injury to persons and damage to property on the ground as a result of voluntary or forced landing, crash, or objects falling from aircraft in flight. In the decisions thus far, however, the plaintiff has recovered for direct and generally for consequential damages resulting from direct contact with persons and property not on established landing areas[4] by non-air carrier aircraft. No cases have been discovered dealing with recoveries against air carriers for injury or damage by crash on the surface, although there are numerous cases involving damage from flying over land of another.[5]

The legal principles upon which the liability has been established by the courts are not uniform, some cases being decided upon principles of trespass and some on negligence. The American Law Institute, in its Restatement of the Law of Torts, classifies aviation as an ultra-hazardous activity for which absolute liability attaches for injury to third persons or property.[6]

Some states regulate the liability of common carriers and other operators of aircraft for damage on the surface by statute. Thus, the Uniform State Law for Aeronautics, Section 5,[6a] in effect in fourteen states and the territory of Hawaii,[7] provides

[4] Guille v. Swan, 19 Johns. 381 (N. Y. 1822) (free balloon landed in garden); Rochester G. & E. Corp. v. Dunlop, 148 Misc. 849, 266 N. Y. Supp. 469 (1933) (crashed into transmission line tower); Livingston v. Flaherty (Sup. Ct., L. A. Co., Cal., No. 329013, Nov. 15, 1932), (1933) 4 J. Air L. 515, 517, 523-4 (forced night landing killed farmer carrying lantern to aid plane); see, Kirschner v. Jones & White, 1932 U. S. Av. R. 278 (N. J. 1932) (damage to house roof); Sollak v. State of New York, 1929 U. S. Av. R. 42 (Ct. Claims, N. Y. 1927) (automobile passenger struck by plane); Kadylak v. O'Brien (U. S. D. Ct. W. D. Pa.) 1941 U. S. Av. R. 8 (1941) (death of boy swimming in creek by emergency landing); see, Pentz v. Rex. [1931] Exch. C. R. 172, 1936 U. S. Av. R. 294 (Canada; forced landing, a privileged trespass). Liability for injury occurring on established landing area depends upon negligence. State v. Sammon, 171 Md. 178, 189 Atl. 265 (1936); Finfera v. Thomas, 119 F. (2d) 28 (C. C. A. 6th, 1941) (collision of aircraft on the ground governed by negligence).

[5] There have been cases involving damages caused by flight over property rather than direct contact. Many of these involve the concept of the extent of the landowner property rights, in super adjacent air space, and are analogous to nuisance cases: Smith v. New England Aircraft Co., 270 Mass. 511, 170 N. E. 385 (1930); Swetland v. Curtiss Airports Corp., 41 F. (2d) 929 (D. Ohio 1930) *mod'f'd.* 55 F. (2d) 201 (C. C. A. 6th 1932); RHYNE, AIRPORTS AND THE COURTS (1944) Chp. VII; Causby v. United States, 60 F. Supp. 751 (Ct. Cl. 1945).

[6] 3 RESTATEMENT, TORTS (1938) §520.

[6a] Sec. 5 reads as follows: "The owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person injured, or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly or either or both of them may be sued separately. An aeronaut who is not the owner or lessee shall be liable only for the consequences of his own negligence. The injured person, or owner or bailee of the injured property, shall have a lien on the aircraft causing the injury to the extent of the damage caused by the aircraft objects falling from it." 11 UNIF. LAWS ANN. (1938) 161. This section has been interpreted not to apply to accidents occurring at airports. Birckhead v. Sammon, *supra* n. 4.

[7] DEL. REV. CODE (1935) §5780; IND. STAT. ANN. (Burns, 1933) §14-105; MICH. STAT. ANN. (1937)

that the owner or lessee of an aircraft is absolutely liable for injuries to persons or property on the ground "caused by the ascent, descent or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the person injured was contributorily negligent." This responsibility, since it reaches the owner when the craft is leased, would appear to apply to a person who is "owner" of an aircraft by virtue of being trustee in an equipment trust certificate. This has caused sufficient concern among prospective lenders on air-carrier equipment to lead them to propose a federal statute excluding liability as follows:[7a]

"No person or corporation having a security interest in, or title to, any civil aircraft . . . under a conditional sale . . . shall be liable, by virtue of such interest or title, for injury to person or property as a result of the operation of such aircraft unless such person or corporation was in possession or control of such aircraft. . . ."

Maryland enacted the absolute liability statute in 1922, but repealed it in 1937[7b] to provide that the aircraft owner shall be *prima facie* liable unless the "presumption of liability" is "rebutted by proof that the injury was not caused by negligence on the part of such owner," or of any person operating the aircraft with his permission or of any person maintaining or repairing it with his permission. Georgia has a similar statute making proof of injury *prima facie* evidence of negligence.[8] Three states provide that liability for injury or damage on the surface shall be determined by the law applicable to torts on land.[9] The Arizona statute states that "negligence" is the test of such liability.[10]

Liability for "forced landings" are also dealt with by statute in several states. Seventeen states have adopted Section 4[10a] of the Uniform State Law for Aeronautics of 1922 which provides that the landing of an aircraft on the land of another, without his consent, is unlawful except in the case of a "forced landing,"[10b] and even in that

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§10.25; MINN. STAT. (Mason, Supp. 1940) §5494-11; NEV. COMP. LAWS (1929) §279; N. J. REV. STAT. (1927) §6:2-7; N. C. GEN. STAT. (1943) §63-14; N. D. REV. CODE (1943) §2-0305; R. I. GEN. LAWS (1938) Ch. 109, §5; S. C. CODE (1942) §7104; S. D. CODE (1939) §2.0305; TENN. CODE (1938) §2720; VT. PUB. LAWS (1933) §5224 as amended by Public Acts, 1939, p. 157; WIS. STAT. (1943) §114.05; HAWAII REV. LAWS (1945) §4925. The text of each of these statutes will be found in either 1928 or 1929 U. S. Aviation Reports.

[7a] AIRLINE FINANCE (Bankers Trust Co., *et al.*, 1945) 12.

[7b] MD. CODE ANN. (1939) Art. 1A, §5 (L. 1937, c. 528), 1937 U. S. AV. R. 631.

[8] GA. CODE (1933) §11-105, 1933 U. S. AV. R. 422.

[9] ARK. STAT. (1944 Supp.) p. 1267; IDAHO CODE ANN. (1932) §21-105, 1931 U. S. AV. R. 336; PA. STAT. ANN. (Purdon, Pocket Supp. 1944) Title 2, §1469.

[10] ARIZ. CODE ANN. (1939) §48-111, 1929 U. S. AV. R. 406.

[10a] Sec. 4 reads as follows: "Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, however, the owner or lessee of the aircraft or the aeronaut shall be liable, as provided in sec. 5." 11 UNIF. LAWS ANN. (1938) 160, 1928 U. S. AV. R. 473.

[10b] "Forced landing" is not defined in the uniform act. Presumably it means the landing of an aircraft in the control of the operator short of destination in an emergency.

event the owner is absolutely liable for the damages so caused.[11] Six additional state statutes make the landing of an aircraft on the land of another unlawful, when made without his consent, except in case of a forced landing. Three of the six statutes provide that liability for damage caused by such landings will be governed by the rules of torts on land;[12] Maryland holds the owner *prima facie* liable, subject to proof of absence of negligence; and two of these states are silent as to liability for forced landings.[13]

Forced landings are analogous to problems dealt with by two old legal doctrines. One is that entry may be made on land of another without the owner's permission for the purpose of saving life. This may be done as a "privileged trespass"[14] pursuant to which the actor should be liable only for the actual damage inflicted.[14a] The second notion applicable to a forced landing is that of "accidental intrusion." Thus, when the plane must be landed for reasons beyond the control of the pilot, the result is an accidental intrusion[15] (if flying is not an ultra-hazardous activity).

Proposed legislation dealing with the aircraft operators' liability for damage on the surface would permit the plaintiff to recover solely upon proof of the damage having been caused by aircraft. This is the effect of the Rome Convention,[16] concluded in 1933, but not widely adopted;[17] the state law proposed in 1938 by the Commissioners on Uniform State Laws;[18] and the pending O'Hara Bill.[18a]

[11] In addition to the states listed in footnote 7 the following three states have adopted sec. 4; COL. STAT. ANN. (1944 Cum. Supp.) Ch. 17, §16; MONT. REV. CODE (1939 Supp. to 1935 Code) §2736.7; WYO. REV. STAT. (1931) §4-107.

[12] ARIZ. CODE (1939) §48-111 provides that the test shall be negligence; IDAHO CODE ANN. (1932) §21-104 and 21-105; PA. STAT. ANN. (Purdon, Supp. 1944) Title 2, §1468-1469.

[13] ARK. STAT. (1944 Supp.) p. 1266, §9; MO. REV. STAT. ANN. (1943) Vol. 26, §15108.

[14] Ploof v. Putnam, 81 Vt. 471, 71 Atl. 188 (1908); see Pentz v. Rex, *supra* note 4.

[14a] Vincent v. Lake Erie Trans. Co., 109 Minn. 456, 124 N. W. 221 (1910).

[15] 1 RESTATEMENT, TORTS, p. 395, ill. 1.

[16] DEP'T OF STATE, TREATY INFORMATION BULLETIN No. 47 (August 1933). Article 2 reads:
"(1) The damage caused by an aircraft in flight to persons or property, on the surface shall give a right to compensation by the mere fact that it is established that the damage exists and that it was caused by the aircraft.
"(2) This provision shall be applicable to the following:
"(a) Damage caused by any body whatever falling from the aircraft, even in the case of regulation jettison of ballast or jettison made in a case of necessity.
"(b) Damage caused by any person on board the aircraft, except in the case of an act intentionally committed by a person who is not a member of the crew, not connected with the operations, without the operator or his agents having been able to prevent it.
"(3) The aircraft is considered as in flight from the beginning of the operations of departure until the end of the operations of arrival."

[17] The following countries have ratified the Convention: Spain, Rumania, Belgium, Guatemala and Brazil. Latchford, *Private International Air Law* (Jan. 7, 1945) 12 DEP'T OF STATE BULL. (No. 289) 11, 13.

[18] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE 48TH ANNUAL CONFERENCE (1938) 318-347. (Hereafter cited as "HANDBOOK.") See Godehn, Brophy, Butler and Hale, *Proposed Law of Airflight* (1937) 8 J. OF AIR L. 505, (1938) 9 *id.* 132.

[18a] H. R. 532, 79th Cong., 1st Sess. (Jan. 1945). Sec. 1252 of the Bill as introduced, reads: "The carrier shall be absolutely liable for bodily injury or death caused to persons or damage caused to property within the scope of this article: *Provided,* That for injury, death, or damage caused within the area of an airport available for use for the storage, handling, loading, unloading, taxying, take-off, or landing of aircraft, the carrier shall be liable only upon proof of negligence."

The imposition of absolute liability for personal injury and property damage on the surface has been regarded as particularly onerous.[19] By such a standard the air carrier would be liable, regardless of its conduct, when it crashed because of the negligent operation by another operator, when an unpredicted storm strikes down the ship, when the craft is stolen and crashes and for the damage done by bombs dropped from a stolen plane by a thief.

The imposition of absolute liability may go beyond what is necessary to facilitate the plaintiff's recovery.[19a] Thus, if the air carrier would be liable unless he proved he was not at fault, the plaintiff's difficulties would be eased considerably yet the carrier would not have to bear the losses caused by third persons. This would follow the precedent of the Maryland and Georgia statutes which provide that the owner of the aircraft causing the damage is *prima facie* liable unless the owner can prove he was not negligent.

There is no federal statute requiring an air carrier to carry insurance to cover liabilities arising from damage caused on the surface, as there is in the case of motor carriers.[19b] But in surveys made by the staff of the Civil Aeronautics Authority in 1939,[19c] it was learned that all domestic air carriers certificated by the Board at that time carried insurance against such liabilities.

B. *Recovery by a passenger for personal injury*

A passenger can recover damages from an air carrier for personal injuries on the same basis as a passenger can from a surface carrier. The carrier must have been at fault and the fault caused the damage.[20] This distinguishes the liability of a common carrier of goods who is an insurer thereof,[21] i.e., it is liable on proof of

[19] Cooper, *Aircraft Liability to Persons and Property on the Ground* (1931) 17 A. B. A. J. 435.

[19a] See, Kingsley and Gates, *Liability to Persons and Property on the Ground* (1933) 4 J. OF AIR L. 515.

[19b] 49 STAT. 557 (1935), 49 U. S. C. (1941) §315.

[19c] SWEENEY REPORT, *supra* note 2, at 148.

[20] "Carriers of passengers by land . . . are not liable for injuries happening to passengers from unforeseen accident or misfortune, where there has been no negligence or default; but . . . the smallest negligence would render the carrier liable." City of Panama v. Phelps, 101 U. S. 453, 462 (1880). See the instructions to the jury in McCusker v. Curtiss-Wright (Cir. Ct., Cook Co. Ill. 1932) 1932 U. S. Av. R. 100, 106, approved in McCusker v. Curtiss-Wright, 269 Ill. App. 502, 1933 U. S. Av. R. 105 (1933). Much of the early argument was whether air carriers were common carriers. Law v. Transcontinental Air Transport, Inc. (U. S. D. C. E. D. Pa.) 1931 U. S. Av. R. 205 (1931). Wilson and Anderson, *Liability of Air Carriers* (1942) 13 J. OF AIR L. 281. But once an air carrier was held to be a common carrier it was held to the same responsibilities as a common carrier on land. Curtiss-Wright Flying Service v. Glose, 66 F. (2d) 710, 1933 U. S. Av. R. 26 (1933); Smith v. O'Donnell, 215 Cal. 714, 12 P. (2d) 933, 1932 U. S. Av. R. 145 (1932).

[21] The rules are contrasted in 4 R. C. L. 582-586: "While carriers of goods are practically insurers of the property entrusted to them, yet in the carriage of passengers the same principles of law are not applied, for the obvious reason that a great distinction exists between persons and goods, passengers being capable of taking care of themselves, and of exercising that vigilance and foresight in the maintenance of their rights which the owners of goods who have entrusted them to others cannot do. Although a few early English cases apparently countenanced the doctrine that common carriers of passengers are liable as insurers of the safety of the passengers whom they undertake to carry, it is now well established, both in England and in the United States, that carriers of passengers are not insurers against accident, but are answerable for any injury to a passenger only when there has been a want of proper care, diligence or skill on the part of the carrier or his servants, unless such injury be wilfully inflicted. It will thus be seen that the liability of the carrier of passengers differs materially from that of a carrier of goods."

loss, unless it can establish that the damage was caused by an act of God or public enemy, mandate of public authority, inherent nature of the goods or fault of the shipper.[22]

The plaintiff's burden of proving fault by a common carrier of passengers is easier than the burden in a non-carrier case, because a common carrier has the duty of being careful in all the numerous acts that constitute transportation and slight negligence imposes liability. The courts describe this standard as the carriers' duty to exercise the "highest degree of care."[23] Nevertheless, from the plaintiff's point of view the proof of fault remains difficult. The burden was described as follows:

"Suppose, for example, that Mrs. Smith has sustained a fracture of an arm as a result of a sudden lurch of a street car in which she was riding. To become informed as to her right against the company she must consult a lawyer. The lawyer will tell her that her right to recover damages from the company depends in the first place upon her ability to prove that the lurch was caused by some fault upon the part of an employee of the company. The fault might have been in the operation of the car, and to prove this it would be necessary to show how a car should have been operated under the conditions which prevailed at the time of the accident, and just how the motorman or conductor failed to observe the proper standard of conduct. Or the negligence might have consisted in the use of improper appliances, or in failing to keep up the equipment of a car, or the condition of the roadbed and tracks. To establish such negligence it would probably be necessary to call electrical engineers, civil engineers, or other experts."[24]

The difficulties of plaintiff passengers and persons on the ground in air carrier cases are alleged to be greater than those of plaintiffs in surface carrier cases, for the following reasons:

1. Many crashes kill all occupants, who are presumably the best witnesses. Thus, of 44 domestic airline accidents involving the death of a passenger between 1933 and 1942, inclusive, 29 resulted in the death of all occupants and 15 left some survivors.[25] Reliable witnesses on the ground who can testify as to an aircraft accident are difficult to find, particularly when crashes occur in remote places.

2. The operation and navigation of aircraft is so technical that the testimony of lay witnesses, even when available, is generally indefinite and of little value.

3. The physical evidence of what occurred in an aircraft at the time of, or immediately prior to most serious accidents, is often demolished by the crash, consumed by fire and occasionally lost under water.

4. The path of an aircraft in the sky is more difficult to reconstruct than would be the course of an object on a highway.

These difficulties of the plaintiff are summarized in a statement ascribed to Dean John H. Wigmore, who is reported[26] to have said, after an investigation of the acci-

[22] 9 AM. JUR., *Carriers* (1937) §705 *et seq.* How the liability of air carriers for transportation of property is affected by the Civil Aeronautics Act of 1938, is considered in SWEENEY REPORT, pp. 73-86.

[23] Wilson v. Colonial Air Transport, 478 Mass. 420, 180 N. E. 212, 1932 U. S. Av. R. 139. Instruction to jury in McCusker v. Curtiss-Wright, *supra* note 22.

[24] Ballantine, *A Compensation Plan for Railway Accident Claims* (1915) 29 HARV. L. REV. 705, 706.

[25] SWEENEY REPORT, *supra* note 2, at 343, supplemented by analysis prepared by Mr. Stafford Kernan, Chief Statistical Section, Civil Aeronautics Administration.

[26] Statement of Mr. Schnader before the National Conference of Commissioners on Uniform State Laws at Cleveland, Ohio, July 19, 1938, HANDBOOK, *supra* note 18, at 72.

dent files of the former Bureau of Air Commerce, that less than 20 per cent of the cases reveal the existence of legally competent evidence to prove the negligence of the aircraft operator.

These contentions are not unchallenged, however.

1. The assertion that "all physical evidence of what happened is demolished by the crash" is denied by many experts. Government investigators, with two exceptions,[27] have been able to reconstruct what happened prior to the crash of air carrier planes.

2. An advantage to the plaintiff in aircraft crash litigation is the fact that the Civil Aeronautics Board makes an extensive investigation[28] of the cause of the accident and, although the Board's report may not be used in court,[29] the hearings are public and the transcripts can be purchased by the plaintiffs as an aid in determining the cause of the crash.

The plaintiff's burden of proof must be considered also in the light of the common law doctrine of *res ipsa loquitur*. That doctrine was designed to aid plaintiffs whose burden of proof was unusually severe.[30] The notion is that in situations in which the cause of the accident is within the exclusive and predominant knowledge of the defendant so that he alone can adequately show what brought it about and where the accident must have been almost impossible, or at least extremely unlikely to happen in the absence of negligence, the plaintiff can prove the surrounding circumstances and negligence may be inferred.

In order to apply the doctrine, it has been stated that four conditions must be present:

"1. That the general experience of mankind shows that the accident was such that it does not usually occur in the ordinary course of events without negligence upon the part of those in control. 2. The person against whom the doctrine is sought to be invoked must have been in control of that instrumentality. 3. The person invoking the doctrine must not be in a position to know the cause of the accident. 4. The person against whom the doctrine is invoked must possess or have possessed either knowledge as to the cause of the accident or must be in a better position to obtain that knowledge so that the duty of explaining the accident should in fairness rest upon him on account of that greater knowledge or greater means of knowledge."[31]

Litigants have had difficulty getting the courts to apply the rule in aviation cases generally.[32] The first difficulty is in determining whether at any given time a par-

[27] The Board was unable to determine the cause of the American Airline crashes at St. Thomas, Ontario, on October 30, 1941, or at Memphis, Tenn., on February 10, 1944.

[28] The duty of the Board in this respect is set out in 52 STAT. 1013 (1938) 49 U. S. C. (1941) §582(a)(2).

[29] *Id.*, §581.

[30] The doctrine in relation to air transportation is discussed in the following: Bohlen, *Aviation Under the Common Law* (1934) 48 HARV. L. REV. 216, (1935) 6 AIR L. REV. 155; Gates, *Res Ipsa Loquitur* (1933) 4 J. OF AIR L. 429; HOTCHKISS, THE LAW OF AVIATION (2d ed. 1938) 50; Osterhout, *The Doctrine of Res Ipsa Loquitur* (1931) 2 AIR L. REV. 9.

[31] Parker v. James E. Granger, Inc., 4 Cal. (2d) 668, 52 P. (2d) 226 (1935).

ticular accident does or does not occur in the ordinary course of events without negligence upon the part of those in control. In Wilson v. Colonial Air Transport,[33] a case involving an air carrier, the court refused to conclude that negligence necessarily caused an airplane motor to stop immediately after a plane took off. In Boulineaux v. City of Knoxville,[34] a case involving a local carrier on sightseeing flights, the court said, "It is a common and not an unusual occurrence for airplanes to stall and fall while in operation and without the interference of any action on the part of the operator." Another case[35] where the court refused to apply the doctrine involved a guest on a test flight by the carrier. In view of the performance record of the scheduled carriers, it would appear that the doctrine should be applied as it has been in several carrier cases,[36] but the decisions do not warrant a categorical statement that it would be applied.

The courts have applied the doctrine where there was a collision.[38]

Another difficulty is that if the plaintiff pleads specific acts of negligence, the doctrine apparently will not apply.[39]

Once the difficulties discussed above are overcome and *res ipsa loquitur* is applied there are two views as to how *res ipsa loquitur* affects the burden of proof. One view is that a presentation of the surrounding circumstances permits, but does not compel, an inference of negligence. Thus, a verdict could not be directed, even if the defendant failed to present evidence, for the burden of proof remains with the plaintiff. This appears to be the weight of authority.[40] A second view is that when the doctrine is applied a presumption is created which requires a verdict for

[32] The doctrine was not applied in: Herndon v. Gregory, 190 Ark. 702, 82 S. W. (2d) 244 (1935); Smith v. Whitely, 223 N. C. 534, 27 S. E. (2d) 442 (1943) in which the court said "The doctrine of res ipsa loquitur does not apply because any number of causes may have been responsible for the plane falling, including causes over which the pilot has absolutely no control, it being common knowledge that aeroplanes do fall without fault of the pilot." In Deojay v. Lyford, 139 Me. 234, 29 A. (2d) 111 (1942), the court refused to apply the doctrine to a case involving the swerving of a plane at landing. The doctrine was applied by the trial court in instructions to the jury in the following cases: Seaman c. Curtiss-Wright (Sup. Ct. Suffolk County, N. Y.) 1931 U. S. Av. R. 229 (1931); Stoll v. Curtiss-Wright (Sup. Ct. N. Y. County) 1930 U. S. Av. R. 148 (1930), *aff'd.* without opinion, 236 App. Div. 664, 1932 U. S. Av. R. 163; Morrison v. Le Tourneau Co. of Georgia, 138 F. (2d) 339 C. C. A. 5th 1943).

[33] (Boston Mun. Ct. 1931) 1931 U. S. Av. R. 109, *aff'd.* Wilson v. Colonial Air Transport, *supra* n. 23.

[34] 20 Tenn. App. 404, 99 S. W. (2d) 557 (1935).

[35] Cohn v. United Air Lines Transport Corp., 17 F. Supp. 865 (D. Wyo. 1937).

[36] In Smith v. O'Donnell, the doctrine was applied in the trial court but the decision reversed for other reasons, 5 P. (2d) 690 (1931), *aff'd.* 215 Calif. 714, 12 P. (2d) 933; Kamienski v. Bluebird Air Service, 321 Ill. App. 340, 53 N. E. (2d) 131 (1944) *aff'd.* 389 Ill. 462, 59 N. E. (2d) 853 (1945).

[38] Doctrine applied in a case involving a collision in Smith v. O'Donnell, *supra* note 36; Parker v. Granger, *supra* note 31.

[39] Goodheart v. American Airlines, Inc., 1 N. Y. S. (2d) 288, 1938 U. S. Av. R. 148 (1937); Johnson v. Western Air Express Corporation, 45 C. A. (2d) 614, 114 P. (2d) 688 (1941) (the court said the doctrine was not relied upon because plaintiff asserted specific acts of negligence, and did not ask for an instruction to the jury on the doctrine).

[40] Sweeney v. Eving, 228 U. S. 233 (1913); Nashville C. and St. L. Ry. Co. v. York, 127 Fed. (2d) 606 (C. C. A. 6 1942); Ryan v. St. Paul Union Depot Co., 168 Minn. 287, 210 N. W. 32 (1926).

the plaintiff unless the defendant proves not only the pertinent facts, but also persuades the trier of fact that his conduct was not negligent.[41]

It is pertinent to consider whether present rules have resulted in unreasonably small recoveries to plaintiffs in air carrier liability suits. A survey of the settlements made by the aviation insurance underwriters over a period of years shows that the average settlement for the death of persons riding as passengers on air carriers for the years 1934 through 1941 has been $11,240. Two judgments recovered for death during the period totaled $95,650. The average compensation for 71 claims for severe personal injuries was $753. For 340 minor injury claims during the same period, the average compensation was $261. Although the average settlements may shed little light on the problem of adequacy of individual settlements, it is interesting to note that the staff of the Civil Aeronautics Board which studied a series of individual claim files of the underwriters and the amounts paid between 1934 and 1938, concluded that, "Proponents of remedial legislation contend that because of uncertainty of recovery under the common law, worthy claimants cannot prove the liability of the aircraft operator, and that the underwriters take advantage of this situation to effect unreasonably low settlements whenever possible. No statistics have been submitted by such proponents in support of this contention and the examination made of underwriters' records and claim files discredits it."[42]

A comparison with the recoveries and settlements in claims of passengers for injury in railroad accidents cannot be made for such figures are not available from public records. The Interstate Commerce Commission reports show total costs for "persons injured" which include not only payments to the claimants, but other costs which leave the amount paid passenger claimants obscure.[43] Average recoveries for personal injuries rising out of the operation of private automobiles were much lower than those in air carrier cases.[44]

How many people are directly affected by the rules of liability applicable to air carriers? The following table indicates the number of people injured and killed due to the operation of air carrier aircraft on the one hand, and by all other civil aircraft on the other. The number of railroad passengers and railroad employees injured and killed and the number of persons injured and killed by the operation of private automobiles are also set out.

[41] In SHAIN, RES IPSA LOQUITUR (1945) 182, the author argues that this view is the one intended by the doctrine, but he recognizes that the majority of American courts now support the first view.

[42] SWEENEY REPORT, *supra* note 2, at 161, 162. (Exh. 25 was supplemented to bring settlement statistics through 1941 as the basis for the figures used above.)

[43] I. C. C., STATISTICS OF RAILWAYS IN THE U. S. (1943) 168, shows an item, "Injuries to persons" $39,296,031, of which $12,242,702 is apportioned to passenger service. But this item includes costs of carriage fees, claim adjusters and clerks' services, claim adjusters' office expenses, railway transportation, and witness' fees and expenses at inquests and law suits as well as judgments, and medical and hospital expenses. The figure also includes expenses with regard to employees injured in passenger service.

[44] For findings by the Committee to Study Compensation for Automobile Accidents of the Columbia University Council for Research in the Social Sciences, see Smith, *Compensation for Automobile Accidents: A Symposium* (part I, *The Problem and Its Solution*) (1932) 32 COL. L. REV. 785, 794.

	Air Carrier Passengers		Aircraft[45] Employees		Other[45] Civil Aircraft		Railroad[46] Passengers		Railroad[46] Employees		Private[47] Autos	
	Killed	Injured	Killed	Injured	Killed	Injured	Killed	Injured	Killed	Injured	Killed	Injured
1941	35	48	9	14	325	742	41	2,909	826	25,188	39,969	1,400,000
1942	55	6	16	4	218	646	98	3,388	1,043	35,106	28,309	1,000,000
1943	22	10	8	8	255	686	271	5,013	1,089	45,685	23,823	800,000
1944	48	22	10	11	257	619	245	4,678	1,087	47,221	24,300	850,000

Death rate per 100,000[48] passenger miles, 1944

Scheduled air carrier	2.1
Railroad passenger trains	0.26

Suggestions that legislation should be enacted to afford special liability rules for persons injured by aircraft have been met by observations that more persons are killed per year by venomous animals than were killed and injured by air carrier accidents.[49] This may appear to be a humorous aside, but it indicates sharply that the problem affects a relatively small number of people.

Legislation to change the present rules governing the passenger's recovery from air carriers was proposed in a uniform state law by the Commissioners on Uniform State Laws in 1938. The rule proposed was that air carriers be absolutely liable for injuries to passengers. The act was not recommended to the states at the request of the then newly created Civil Aeronautics Authority until that body could study the matter.[50] The pressure of war activities postponed for a time the Board's consideration of liability legislation.[51]

Since 1943 a bill to regulate certain liabilities of air carriers by federal statute has been introduced in each session of Congress. The current bill, like each of its predecessors, would hold the carrier liable for passenger injuries unless the "carrier proves affirmatively that the injury or death did not proximately result from a failure to use the highest degree of care on the part of itself or any of its servants acting within the scope of their employment."[52] This is a statutory version of the minority view application of *res ipsa loquitur* which would shift the burden of proof and permit a directed verdict for the plaintiff, if the carrier failed to sustain its burden.

Precedent for such a shift of the burden of proof by legislation exists in the Warsaw Convention,[53] concluded in 1929, which came into force in the United States on October 29, 1934 and is now in effect in thirty countries.[54] Article 20, thereof

[45] SWEENEY REPORT, *supra* note 2, supplement to Exhs. 5 and 6.

[46] NAT'L SAFETY COUNCIL, INC., ACCIDENT FACTS (1945 ed.) 44, 88.

[47] *Id.* at 73. [48] *Id.* at 87.

[49] Thus in 1944, 140 persons were poisoned by such animals and only 91 were injured or killed in air carrier accidents. *Id.* at 54, 89; SWEENEY REPORT, *supra* note 2, supplementing to Exh. 5.

[50] SWEENEY REPORT, *supra* note 2, at 9. [51] C. A. B. Press Release, April 9, 1942.

[52] Sec. 1212 of H. R. 532, 79th Cong., 1st Sess. (1945). [53] U. S. Treaty Series 876.

[54] Ratifying countries: Australia and territories under mandate; Belgium, including Belgian Congo and territory under mandate; Brazil; Czechoslovakia; Denmark; France, including Colonies, Protectorates and mandated territories; Germany; Great Britain and Northern Ireland, including the largest part of her possessions and Colonies; Italy, including possessions and Colonies; Latvia; Netherlands, including Netherlands West Indies, Surinam and Curacao; Norway and possessions; Poland; Rumania; Spain and Spanish Morocco and Colonies; Switzerland; U. S. S. R.; Yugoslavia. Adhering countries: Danzig; Finland; Greece; Hungary; India; Ireland; Liberia; Liechtenstein; Mexico; New Zealand; Sweden; United States of America.

provides that "the carrier shall not be liable, if he proves that he and his agents have taken all necessary measures to avoid the damage, or that it was impossible for him, or them, to take such measures." The Convention applies to "all international transportation of persons, baggage, or goods performed by aircraft for hire" so that, under the contract of carriage, passengers whose destination is one of the thirty countries, or passengers who have an agreed stop at any foreign country and return to the United States will have their claims for compensation governed by the Convention.[55] Thus, where the crash occurred at Lisbon, the Convention applied to a passenger bound to Lisbon, *and return,* from New York, despite the fact that Lisbon is not a signatory.[56]

II. Can the Defendant Air Carrier Limit Its Liabilities?

Limiting liability to passengers by contract, or otherwise, involves questions which in the past have depended on state law.[57] Most jurisdictions hold that a common carrier cannot contract to exempt itself from liability to its passenger for its own negligence[58] or contract to limit the amount of recovery for negligence.[59]

The recovery for the death of a passenger, or of a person on the surface, is now subject to any state statute limiting the amount recoverable because of wrongful death. Thus, in sixteen states and two territories the recovery is limited to sums between $5,000 and $15,000.[60] There are no statutory limitations on recoveries for personal injuries and for property damage; in fact, in several states there are constitutional prohibitions against limitations on recoveries for personal injury or death.[61]

Recoveries by passengers subject to the Warsaw Convention are limited by Article 22 to 125,000 francs (approximately $8,300). These treaty provisions override the public policy of the states.[62]

It is significant that all recent proposals would limit the amount for which an air carrier would be liable for either injury to persons or damage to property. The

[55] Choy v. Pan-American Airways (U. S. D. C., S. D. N. Y. Mar. 16, 1941, unreported) 1941 U. S. Av. R. 10; Wyman v. Pan-American Airways, Inc., 43 N. Y. S. (2d) 420; 1943 U. S. Av. R. 1 (1943), *aff'd* 267 App. Div. 947, 293 N. Y. 878, *cert. den.* April 23, 1945, 324 U. S. ——; Indemnity Ins. Co. v. Pan-American Airways (U. S. D. C., S. D. N. Y. December 22, 1944) 235 C. C. H. 1255. See, also, GOEDHUIS, NATIONAL AIR LEGISLATION AND THE WARSAW CONVENTION (1937); Sullivan, *Codification of Air Carrier Liability* (1936) 7 J. OF AIR L. 1.

[56] Garcia v. Pan-American Airways, Inc., 269 App. Div. 287, 55 N. Y. S. (2d) 317 (1945).

[57] Conklin v. Canadian-Colonial Airways, 266 N. Y. 244, 194 N. E. 692 (1935).

[58] E.g., N. Y. C. R. R. Co. v. Lockwood, 17 Wall. 357 (U. S. 1873). But New York, England, and Canada permit limitation. Anderson v. Erie R. Co., 223 N. Y. 277, 119 N. E. 557 (1918); Forder v. Great Western Rwy., [1905] 2 K. B. 532; Luddit v. Ginger Coote Airways, [1942] 4 D. L. R. 353; 1942 U. S. Av. R. 178.

[59] Conklin v. Canadian-Colonial Airways, Inc., 266 N. Y. 244, 194 N. E. 692 (1935) (limitation invalid because no choice of rate offered with unlimited liability).

[60] States and territories having statutory limitations on liability for wrongful death: Alaska $5,000, Cal. $5,000, Conn. $15,000, D. C. $10,000, Ill. $10,000, Ind. $10,000, Kan. $10,000, Me. $10,000, Mass. $5,000, Minn. $10,000, Mo. $10,000, N. H. $10,000, N. M. $7,500 (public conveyance only, see N. M. Const. Art. 20, §16), Ore. $10,000, S. D. $10,000, Va. $15,000, W. Va. $10,000, Wis. $15,000.

[61] States with constitutional provisions prohibiting the limitation of liability for wrongful death: Ariz., Ark., Ky., N. Y., Ohio, Okla., Pa., Utah, Wyo.

[62] Indemnity Ins. Co. v. Pan-American Airways, *supra* note 55.

Rome Convention, Article 8, would limit the recoveries for personal injury and property damage on the surface to 2,000,000 francs for one aircraft. The Uniform Act proposed by the Commissioners on Uniform State Laws would limit recoveries by passengers and persons on the surface to $10,000 per person, and for property damage to $100,000 per accident.[62a] The pending Congressional bill would limit recovery of passengers and persons on the surface to $10,000 for death and $50,000 for personal injury per person. For property damage on the surface the recoveries would be limited to $7 per pound of the landing weight of the aircraft. A similar over-all limit applies to liability for injury to persons on the surface.[63]

A limitation on recoveries against the carrier is urged, particularly if the burden of proof is placed on the defendant, because it weakens the bargaining position of the carrier in the settlement negotiations. A limitation of the carrier's liability is reasonable, if the burden of proof is shifted in cases where the causes of the accident are obscure, the loss will not be left spread among several persons as under the present rules, but will be concentrated on the carrier.

The opposing considerations regarding the amount of limitation are, on the one hand, that the limit should not be too low, particularly for recoveries for personal injury, because the consequences of permanent disability can cause more pecuniary damage in some cases than death. On the other hand, the establishment of high maximum recoveries is feared by insurance underwriters because it may raise individual recoveries to make such a maximum an actual minimum. One compromise regarding the amount to which recoveries be limited would be to set a maximum not on the amount which can be recovered per person, but a maximum sum for which the air carrier could be liable per aircraft. Such a figure for recovery by passengers might be formulated on the number of passenger seats, i.e., the air carrier would be liable for a figure not to exceed the equivalent of $10,000 for each seat. In this way, a figure could be set high enough to permit adequate recovery by passengers; i.e., for a DC-3 with twenty-one seats the maximum liability would be $210,000 and for a 100 seat plane, the maximum would be $1,000,000.[63a] Since a normal occupancy of a passenger airliner is 65 per cent and some individual settlements are low because there is no claim or no showing of dependency,[64] such a maximum would permit an allocation of varying amounts among the individual plaintiffs in proportion to their loss. At the same time, the air carrier would have a maximum over-all limit. Each claimant would sue and prove his damage as is true at present. The statutory limitation would have no bearing on the case, unless the total recoveries exceeded the maximum, in which event, the maximum would be

[62a] HANDBOOK, *loc. cit. supra* note 18.

[63] H. R. 532, §1255, 79th Cong., 1st Sess. (1945).

[63a] In addition a limit based on a given number of dollars per pound of the aircraft could be applied to claims for personal injury and property damage on the surface, cf. sec. 1255 of H. R. 532, *supra* note 63.

[64] See Exh. 25 of SWEENEY REPORT, *supra* note 2, which indicates that 15 out of 107 settlements averaged $1,024 each.

allocated among the claimants in a proceeding similar to interpleader. For damage on the surface the recovery would be limited to a figure determined by the weight of the aircraft.

Such limitation would be comparable to that now permitted owners of vessels, *viz.*, when the damage results "without the privity or knowledge of the owners" their liability shall not "exceed the amount or value of the interest of such owner in such vessel, and her freight then pending," except if the amount is insufficient to pay the losses in full and the amount applicable to payment of losses in respect of life or bodily injury is less than $60 per ton of such vessels tonnage, such portion can be increased to an amount equal to $60 per ton.[65] This liability limitation has been applied to personal injuries or death of persons on the ship,[66] seamen's personal injuries,[67] damage to other vessels,[68] damage to structures on land[69] and injuries to persons on land.[70]

Although at first blush it might appear that the source of the federal power to limit liability of owners of vessels lies in the judicial power over cases of admiralty, the early decisions upheld the limitations as an exercise of the power over commerce.[71]

Statutory limitation can be considered as an alternate method of limiting liabilities. Vessel owners could form a corporation to own each vessel so that claims arising from its operation could reach only the remains of the ship. Similarly, if a corporation were formed to own each aircraft and after a crash the victims could look only to the remains of the aircraft and its earnings, the fund for compensation might be negligible, yet the technique would be a familiar one.[71a] In recent years the use of DC-3 airplanes with an original purchase price of approximately $125,000 may have prevented this from receiving serious consideration, but with the coming use of Constellations valued in the neighborhood of $1,000,000 the use of the corporate device is not so far-fetched.

III. CONCLUSION

The law is called upon to find a balance between the interests of air carriers and of persons injured by the operations of such carriers with respect to the compensa-

[65] 49 STAT. 960, 1479 (1935, 1936), 46 U. S. C. (1941) §183.

[66] Butler v. Boston Steamship Co., 130 U. S. 527 (1889).

[67] *In Re* East River Co., 266 U. S. 355 (1924).

[68] Norwich Co. v. Wright, 80 U. S. 104 (1871).

[69] Richardson v. Harmon, 222 U. S. 96 (1911).

[70] The Atlas No. 7, 42 F. (2d) 480 (S. D. N. Y. 1930).

[71] Lord v. Steamship Co., 102 U. S. 541, 545 (1880): "Having found ample authority for the Act as it now stands in the commercial clause of the Constitution, it is unnecessary to consider whether it is within the judicial power of the United States over cases of admiralty and maritime jurisdiction." To the same effect are, Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578 (1873); United States v. Hamburg-Amerikan, Etc. Gesellschaft, 212 Fed. 40 (C. C. A. 2d 1914). In The Hamilton, 207 U. S. 398, 404 (1907) the court said: "The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the constitution extending the judicial power to all cases of admiralty and maritime jurisdiction."

[71a] But query as to its efficacy. See LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS (1936) 192 ff.

tion for injuries and property damage. One method recommended to compensate persons injured in rail and automobile transportation has been to establish specialized boards, which would make compensatory awards.[72] The number of persons injured by air carriers, however, is too small to justify such elaborate machinery.[73] The proposals to improve the plaintiff's recoveries are based on the purported difficulties of a plaintiff in a suit against an air carrier. While these difficulties can be dramatically stated, there has not been a cataloguing of evidence that the victims of air-carrier accidents have been inadequately paid as has been proved with reference to victims of automobile accidents.

If, however, the rules covering recoveries are to be amended to facilitate the plaintiff's recovery from air carriers, it might be based upon a notion that it would be in exchange for the limitation of liability given the air carrier. Thus, the plaintiff would be given greater assurance of some compensation for his personal injury, although the amount of such recovery would be limited. Second, the proposed improvement, i.e., holding the air carrier liable unless the carrier proves that the injury or death did not result from its failure to use the highest degree of care, should be re-examined to determine whether the burden of proof is stated in language sufficiently clear to be a useful guide to the court in litigation and to be a burden of proof which can be sustained.

The air carrier's interest in limiting its potential liability is based not only upon the amount of liability which may attach in the future, but upon the constant cost of insuring against such possibility. The limitation, in the nature proposed above, would result in a limitation on the individual recovery only when the total recoveries exceeded the maximum liability prescribed in the statute.[74] The damage in excess of the limitation would be left where it fell. This policy can be justified with respect to owners of property on the surface because of the low cost of insurance to the surface property owner as compared with the cost of insurance to the air carrier. An extended coverage endorsement added to a fire insurance policy covers against losses by windstorm, cyclone and tornado, hail, explosion, riot, smoke damage, and vehicle damage, including damage from falling aircraft or objects falling therefrom. This form is the coverage readily available to protect against the airplane hazard. The highest rate for home owners in the District of Columbia for this coverage is six cents per $100 of coverage per year. The amount of insurance against property damage which is available to the carrier is limited and expensive.

The limitation on liability would be a method of furthering the national policy regarding air transportation. Congress has stated affirmatively the public interest in air carrier transportation. The Civil Aeronautics Act in its Declaration of Policy[75] emphasizes the encouragement, and development of an air transportation system

[72] See Ballantine, *supra* note 24, and Smith, *supra* note 44.

[73] SWEENEY REPORT, *supra* note 2, at 413.

[74] No air carrier crash in the United States since 1929 has caused more than $7,000 damage on the surface. This occurred at Los Angeles on December 1, 1944.

[75] Sec. 2 of the Act, 52 STAT. 980, 49 U. S. C. (1941) §402.

and the "promotion of adequate, economical, and efficient service by air carriers at reasonable charges. . . ." Limiting liability is a method of promotion first applied in the days of the great sailing fleet. "The great object of the statute (limiting the liability of the vessel owner) was to encourage shipbuilding and to induce the investment of money in this branch of industry, by limiting the venture of those who build the ship. . . ."[76] The modern venture in air carriers invites the same encouragement.

[76] Hartford Accident Co. v. Sou. Pacific, 273 U. S. 207, 214 (1927).

THE CONFLICTING INTERESTS OF AIRPORT OWNER AND NEARBY PROPERTY OWNER

JOHN M. HUNTER, JR.*

In the field of airport law the most important questions confronting the lawyer today—and probably the most difficult—are those arising out of the conflict which almost inevitably exists between the interests of the owner or occupant of land in the immediate vicinity of an airport and those of the airport owner. These questions are: (1) Does the landowner to whom the operation of an airport or the low-flying of aircraft in landing or taking-off is obnoxious or damaging, have a cause of action for damages or injunctive relief against the owner of the airport or the flyer? (2) Can the airport owner, by court action or the adoption of airport zoning regulations, prevent the landowner from erecting a structure which would be an obstruction to the landing and taking-off of aircraft at the airport, or from using his property in a manner hazardous to such aircraft operations?

From the standpoint of the landowner, the airport is often a nuisance due to the noise of airplanes either on the ground or in the air, the dust resulting from aircraft operations, the glare of airport lights, the crowds attracted to the airport, the apprehension occasioned by the low-flying of planes in landing and taking-off, or a combination of two or more of these incidents of airport operation. Unless the owner of an airport site or existing airport can be enjoined from establishing an airport, from continuing to operate it, or from permitting the operations complained of, or can be discouraged from doing so by successful suits for damages, the landowner's property may be depreciated in value, his health and that of his family and friends affected, his business injured, his property physically damaged, or his property rights infringed. On the other hand, if the landowner can collect damages or obtain injunctive relief, the person or public agency desiring to construct or operate the airport may find it difficult if not impossible to do so, depending upon the nature of the relief granted.

Similarly, the use made of property in the vicinity of an airport may be equally damaging to the airport owner. For one thing, such property may often be used in a way creating a hazard to the safe operation of aircraft at the airport, thereby diminishing its utility and value. Such hazards may take the form of glare in the eyes of pilots, dust or smoke resulting in a lessening of visibility, electrical interfer-

* B.S., 1931, Harvard University; LL.B., George Washington University. Member of the District of Columbia Bar. Director, Airport Liaison and Requirements Service, Civil Aeronautics Administration; associated with Office of Airports of Civil Aeronautics Administration and predecessor agencies since 1936. Author of articles on airport law.

ence with radio communication between airport and flyer or with radio aids to air navigation, or a building or other structure which is so located, and of such a height above the elevation of the airport, as to obstruct one of the aerial approaches of the airport.

Of these possible hazards, the physical obstruction is by far the most dangerous to the users of aircraft and therefore the most serious to the airport owner. But more than this, the physical obstruction in effect reduces the length of the runway or landing strip and therefore may destroy the utility of the airport and the large investment it usually represents.

According to the airport approach standards of the Civil Aeronautics Administration,[1] an airport other than one which is so small as to be suitable only for light personal aircraft,[2] if it is to accommodate modern planes with safety, must have aerial approaches or airspace channels extending at least two miles from the ends of its runways or landing strips, within which an airplane can descend or climb at a rate of 30 feet horizontally to one foot vertically, or, in the case of an approach to be used for instrument-landings, descend at a rate of 40 to 1.[3] This means that in the case of most airports, there must be no structure, tree, or other object anywhere within two miles of the airport, in line with one of its runways, which is higher above the elevation of the airport than 1/30 or 1/40 its distance from the end of the runway. As an example, a 50 foot structure constructed on land having the same elevation as the airport, would be an obstruction if located within 1,500 feet of the end of a runway, reducing the effective length of the runway by the number of feet it was within such 1,500 foot limit. Thus, if located 500 feet from the end of the runway, such a structure would make 1,000 feet unusuable for landings and take-offs over it, reducing the effective length of the runway by a third.

It will thus be seen that many of the landowners near an airport may have it in their power to seriously injure its owner merely by making a normal and reasonable use of their property. This makes it important to the airport owner that ways be found and steps taken to limit the height of future structures and objects of natural growth in the vicinity of the airport, without undue expense. But this again is of course directly contrary to the interests of the landowner, particularly if the limitations are to be imposed without compensation.

This conflict of interests between the airport owner and the nearby landowner is necessarily of great concern to the public, and this only partially because of the public interest in protecting and preserving private property rights. Of far great concern to the public is the fact that many airports[4] are owned and operated by municipalities, counties, states, and other public agencies as public facilities,[5] while

[1] CAA Office of Airports Drawing No. 152-C, as revised November 19, 1941.

[2] The CAA recommends that such airports have approached permitting landings and take-offs at a 20 to 1 rate of descent or climb. CAA Drawing No. 152-C, *supra* note 1.

[3] The CAA also recommends the obstruction marking and lighting of any structures near an airport which, although conforming to these standards, are materially higher than other objects in the vicinity.

[4] 1,067 as of December 31, 1944. CAA, CIVIL AVIATION AND THE NATIONAL ECONOMY (September, 1945), Table C-18, p. 117.

most of those which are privately owned are public utilities, serving a public need. If such an airport is abated, or the establishment of such an airport prevented, the consequences may well be not only a serious injury to the owner of the airport property but the loss of an essential and valuable asset to the entire community, to civil aviation, and to the national defense. And if an airport hazard is established in the vicinity of such an airport, not only is the utility of the airport as a public facility impaired but the lives and property of the public are endangered. As is stated in many state airport zoning acts, "the creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question," making it "necessary in the interest of the public health, public safety, and general welfare" that the creation or establishment of airport hazards be prevented.[6]

Actually then, the problem with which the bar, the legislatures, and the courts are confronted is not only how to resolve the conflicting property rights of the airport owner and the neighboring landowner but how far to protect the public interest in the development and availability of airports at the cost of interfering with private property rights.

This problem is coming more and more to the fore as aviation activity increases. Complaints about low-flying and airport noises are heard more frequently. City councils, county boards, zoning commissions, and state aeronautics commissions are being petitioned more often to prevent the establishment of airports in residential areas. More and more suits are being brought by landowners to enjoin airport operations and to recover for damages resulting from such operations. And the number of state airport zoning acts and municipal and county airport zoning ordinances is increasing rapidly.

Aviation itself is becoming alarmed. As evidence of this, an official of the Civil Aeronautics Administration recently took occasion to warn pilots that unnecessary low-flying is building up a prejudice against airports which may cost aviation the support of the public for needed airport development, stating that "we are facing a serious problem in many localities in obtaining satisfactory airport locations because

[5] It is well established by court decisions that the establishment and operation of an airport is a public purpose for which a political subdivision may issue general obligation bonds, levy taxes, and condemn land. See Ulman, *The Public Nature of Airports* (1941) 13 GEO. L. J. 198, and RHYNE, AIRPORTS AND THE COURTS (1944) 17-31.

[6] Substantially similar language is to be found in those airport zoning laws which are patterned upon one or another of the several model airport zoning acts recommended by the National Institute of Municipal Law Officers and the Civil Aeronautics Administration since April, 1939. These airport zoning laws include acts of Alaska, Hawaii, and 24 states, as follows: Alaska L. 1943, c. 23; Hawaii L. 1945, No. 181; Ariz. L. 1945, c. 15; Ark. L. 1941, c. 116; Fla. L. 1945, c. 23.79; Ill. L. 1945, S. B. 445; Ind. L. 1945, c. 190, sec. 9; Iowa L. 1945, H. F. 366; La. L. 1944, No. 118; Me. L. 1941, c. 142; Md. L. 1944, c. 13; Mass. L. 1941, c. 537; Minn. L. 1945, c. 303, sec. 24-36; Neb. L. 1945, L. B. 209; N. H. L. 1941, c. 145; N. M. L. 1941, c. 171; N Y. L. 1945, c. 901; N. C. L. 1941, c. 250; N. D. L. 1945, S. 56; Okla. L. 1945, c. 359; Pa. L. 1945, c. 107; S. D. L. 1943, c. 2; Tenn. L. 1945, c. 74; Utah L. 1945, c. 315; Vt. L. 1945, H. B. 170; Wash. L. 1945, c. 174.

of the objections of neighboring residents."[7] Moreover, both that agency and the Civil Aeronautics Board, departing for the first time from their established policy of not participating in such cases, intervened last year in the *Dlugos* case[8] in opposition to continuance of a temporary injunction which the court had issued at the request of a farmer adjacent to the Allentown-Bethlehem Airport, enjoining United Air Lines from operating aircraft above his property at a height of less than 100 feet. And, as further evidence of this concern, the Committee on Interstate and Foreign Commerce of the House of Representatives has warned that the tremendous investment in airports will become valueless and the airports death traps unless there is adquate airport zoning.[9] In the words of the Committee, "unless zoning is accomplished now, before airport approaches are further obstructed, the task will some day reach staggering proportions. Few steps are of such urgency. Few steps are so essential to promote safety."

But as serious as this problem is today, it will undoubtedly increase greatly in importance as aviation progresses. Aviation experts are predicting an increase in the number of aircraft in this country within the next ten years from 30,000 to over 400,000.[10] And it is expected that Congress will soon authorize a program of Federal grants for airport development designed to double the number of civil airports in the continental United States within five to ten years, as recently recommended by the Civil Aeronautics Administration.[11] It seems evident that any such expansion of aviation must bring with it many additional instances of conflicts between the interests of airport owners and nearby landowners.[12]

In view of these considerations, it is apparent that the legal questions posed in the opening paragraph of this paper constitute a real challenge to the law. In the following paragraphs, an attempt will be made to show how these questions have been answered by the courts and to suggest the legal principles which are involved and should be applied if this challenge is to be met.

[7] CAA press release dated September 2, 1945, reporting statement of John H. Geisse, Assistant to the CAA Administrator for Personal Flying.

[8] Dlugos v. United Air Lines, 1944 U. S. Av. Rep.—(Ct. Comm. Pl. Pa., Lehigh Co., May 27, 1944).

[9] H. R. REP. No. 784, 78th Cong., 1st Sess. (October 20, 1943).

[10] CIVIL AVIATION AND THE NATIONAL ECONOMY, *supra* note 4, at 62.

[11] CAA, NATIONAL AIRPORT PLAN (November 28, 1941) H. R. Doc. No. 807, 78th Cong., 2d Sess.

[12] Such conflicts can sometimes be avoided by action of the airport owner in locating the airport in an unpopulated or rural area, in so laying out the runways that aircraft approaches and take-offs will not be made over residence or built-up areas, in acquiring the lands which otherwise would be affected, or avigation easements therein, or in establishing airport rules and air traffic patterns designed to minimize annoyance to neighboring landowners. And science may well help to solve the problem by reducing the noise of airplane engines and propellers (see CIVIL AVIATION AND THE NATIONAL ECONOMY, *supra* note 4, at 47) or by improving the performance of aircraft through application or use of such scientific discoveries as the helicopter, jet-assisted take-offs, reversible propellers, radar, or even atomic power. However, any such assistance from science is largely speculative and in the future while the possibility of finding a solution to the problem in the manner in which the airport is developed is considerably limited by the fact that airports, if they are to be as useful as they should be, must be located in close proximity to the communities they are to serve where land is usually expensive, aeronautically adequate airport sites are often scarce, and neighboring lands may well be used for residential or industrial purposes. Moreover, there is of course very little that can be done to avoid conflicts with the interests of neighboring property owners where the airport is already established.

IS THE AIRPORT A NUISANCE?

While it is well established that an airport is not a nuisance per se,[13] it appears from the cases on this subject which have been decided to date that an airport may be, or create, a private or public nuisance in fact. In two of those cases the airport itself was completely abated,[14] and in another the normal airport activities and operations were so circumscribed by injunction as to amount to complete abatement.[15] In seven cases, injunctive relief was granted against operation of the airport in a certain manner or against low-flying in connection with use of the airport.[16] In still another case, it was held that low-flying incident to the operation of a municipal airport was a nuisance to an adjoining landowner which entitled the latter to damages if not to injunctive relief.[17] And in a still more recent case, the court warned the defendant city that its operation of a proposed new airport would probably be a nuisance by reason of its nearness to three schools, a church, and several homes, and if so would be enjoined.[18]

[13] Swetland v. Curtiss Airports Corp., 41 F. (2d) 929, 932 (N. D. Ohio, 1930); Thrasher v. City of Atlanta, 178 Ga. 514, 173 S. E. 817 (1934); Batcheller v. Commonwealth of Virginia, 176 Va. 109, 10 S. E. (2d) 529 (1940); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S. E. (2d) 245 (1942); Warren Township School District No. 7 v. City of Detroit, 308 Mich. 460, 14 N. W. (2d) 134 (1944).

[14] Swetland v. Curtiss Airports Corp., 55 F. (2d) 201 (C. C. A. 6th, 1931) modifying decision cited *supra* note 13 (construction and operation of privately-owned airport enjoined at request of owners of residential property located across road from airport site); Gay v. Taylor, 19 Pa. Dist. & Co. Rep. 31 (Ct. of Comm. Pl. Pa., Chester Co., 1932) (operation of privately-owned airport enjoined at request of owners of adjoining country residences and hospital).

[15] People v. Dycer Flying Service, Inc., 1939 U. S. Av. Rep. 21, 235 CCH 1834 (Cal. Super. Ct. L. A. Co., 1939) (injunction issued at request of city enjoining operation of privately-owned airport in manner causing disturbance to landowners in adjacent residential area, as a public nuisance).

[16] Thrasher v. City of Atlanta, *supra* note 13 (judgment reversed with direction to issue injunction against continued spreading of dust in excessive or unreasonable quantities over residential property in vicinity of Atlanta Municipal Airport); Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N. E. (2d) 575 (1942) (decree affirmed upholding injunction against flying below height of 500 ft. over residence 2,800 ft. from city-controlled but privately-operated airport); Mohican & Reena, Inc. v. Tobiasz, 1938 U. S. Av. Rep. 1, 235 CCH 2205 (master's report filed in Super Ct., Hampden, Mass., 1938) (corporate owner of summer camp for children one-half mile from defendants' privately-owned airport found entitled to injunction against flying below altitude of 1,000 ft. within 500 ft. of camp property); Vanderslice v. Shawn, 27 A. (2d) 87 (Del. Ct. Chan., 1942) (residential owners held entitled to injunction enjoining owners of private airport from permitting flights at less than 100 ft. over adjacent dwellings); Alhambra Airport case, 13 J. OF AIR L. & COMM. 138 (1941) (decree issued on petition of certain taxpayers and Alhambra Board of Education, enjoining further use of private airport for pilot training and limiting future use to emergency landings and actual business needs of two aircraft manufacturing plants located at airport); Dlugos v. United Air Lines, *supra* note 8 (airline enjoined from operating planes at altitude below 100 ft. over plaintiff's fields adjacent to municipal airport, on days when plaintiff engaged in farming such fields, not to exceed 10 days during following year, provided 5 hours' written notice given airline at its airport office); Glatt v. Page, unreported (Dist. Ct. Neb., 1928) (injunction granted against flights below 100 ft. over poultry farm).

[17] *Kersey* case, *supra* note 13 (owner of house at end of runway of Atlanta Municipal Airport held to have stated cause of action for damages and perhaps injunction in alleging damages resulting from low-flying). But cf. Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N. Y. Supp. 469 (Monroe Co. Ct. N. Y., 1933) (damages given on theory of trespass); Causby v. U. S., 235 CCH 2216 (U. S. Ct. Cl., 1945) (damages given on theory of a taking under the Tucker Act); Neiswonger v. Goodyear Tire and Rubber Co., 35 F. (2d) 761 (N. D. Ohio, 1929) (damages given on theory that civil suit is authorized for violation of minimum height of flight regulations); cf. Johnson v. Curtiss Northwest Airplane Co., 1928 U. S. Av. Rep. 44 (Dist. Ct. Ramsey Co. Minn., 1923) (defendant enjoined from further violations of state minimum height of flight statute).

[18] *Detroit* case, *supra* note 13.

However, there are also airport nuisance cases in which the court refused to enjoin the establishment or operation of an airport[19] or set aside an airport license issued by the State Corporation Commission,[20] a case in which injunctive relief against the operation of air-meets was denied,[21] and cases in which even damages were refused for injuries resulting from the operation of an airport.[22] And in some of the cases in which some measure of relief was granted, notably the *Kersey* case,[23] that relief was considerably less than that asked by the petitioner.

Granting then that an airport may or may not be or create a nuisance for which relief will be given by the courts, the question is when or in what circumstances is this the case.

While it is always difficult to resolve conflicts between the interests of neighboring property owners, it is submitted that the problem is considerably simplified, as well as more accurately stated, if considered as one of adjusting two public interests, i.e., that in preventing interference with the landowner's use and enjoyment of his property and that in preventing interference with the establishment or continued operation and use of the airport.[24] The former of course depends upon the value to society of the uses to which the land is put or adaptable and the extent to which the airport has interfered, and will interfere, with that use and enjoyment; the latter upon the value to the public of the proposed or existing airport and the effect upon such value which the granting of the relief requested would have. Using this test in a particular case, if the former public interest outweighs the latter, the airport operation complained of is a nuisance and relief should be granted; if the opposite is true, the interference with the landowner's property rights is justified and no nuisance has been created.

For example, the landowner would be entitled to relief where the airport was privately-owned and privately-used and its proper operation seriously interfered with his use or enjoyment of the land, where the airport owner had not acquired enough land to prevent undue interference with the then-existing land uses in the neighborhood, or where the injury was not reasonably necessary or could feasibly

[19] Smith v. New England Aircraft Co., 270 Mass. 511, 170 N. E. 385 (1930); Meloy v. City of Santa Monica, 124 Cal. App. 622, 12 P. (2d) 1072 (1932); *Detroit* case, *supra* note 13; Nicholas v. Mason City, unreported (Iowa, 1941); Littlefield v. City of Tulsa, unreported (Com. Pl. Ct., Tulsa, Okla., 1939); Miles v. Louisville & Jefferson County Air Board, 235 CCH 1881 (Ky. Ct. of. App., 1940).

[20] *Batcheller* case, *supra* note 13.

[21] Lehmaier v. Wadsworth, 122 Conn. 626, 191 Atl. 521 (1937).

[22] *Smith* and *Meloy* cases, *supra* note 19; cf. Sysak v. DeLisser Air Service Corp., 235 CCH 2005 (N. Y. Sup. Ct., Nassau Co., 1931).

[23] *Supra* note 13.

[24] It is suggested that authority for applying this balancing of public interests test in the airport nuisance cases may be found not only in the many cases which have been decided on the question whether the interference with private property rights resulting from the use made of adjoining property by a private person or public agency is justified but in the numerous cases raising the question whether the adoption or administration of a state, municipal, or county police regulation (such as regulations dealing with public nuisances, city zoning, and slum clearance) is, in its effect upon private property rights, a valid exercise of the police power or an unconstitutional taking or confiscation. For a valuable case involving the analogous conflict of interests between railroads and neighboring landowners, see Richards v. Washington Terminal Co., 233 U. S. 546 (1914).

be avoided or mitigated. In any of these events, the relief granted should include both damages and an injunction but with the difference that, in the first two cases, the injunction should go as far as necessary to give adequate relief, even if this means complete abatement of the airport, while in the third case, it should go only as far as to enjoin such of the activities complained of as might be unnecessary and, where possible wtihout seriously interfering with operations at the airport, require conduct of other activities in such a way as to avoid or lessen further injury.[25]

Conversely, it appears that all relief should be denied where the injury to the landowner is the unavoidable result of necessary airport operations and the airport is properly constructed and either publicly-owned or used extensively by the public.[26] As a general proposition, it would seem that neighboring property owners are not entitled to either injunctive relief or damages for any inconvenience, annoyance, or other injury to them resulting from low-flying, noise, dust, crowds, or other incidents of operations at a properly located and constructed airport, where there is a considerable public use of and benefit from such airport and it is operated with as much regard for their interests as is consistent with safety and efficiency.

While these suggested principles have not been expressly stated or approved by the courts, it is submitted that they find support in the results reached in the airport nuisance cases cited *supra* and to some extent in the reasoning of the opinions, and that they explain those results. In other words, it is suggested that the courts have been influenced by the public interest factor, whether consciously or not,[27] and that this is the real explanation of their decisions even though many of them were rested on other grounds.

Thus, in each of the three cases in which airports were abated as nuisances, the *Swetland*,[28] *Gay*,[29] and *Dycer*[30] cases, the airport was privately owned and operated while the plaintiff's property had been put to valuable use, in the *Swetland* and *Dycer* cases for residence purposes and in the *Gay* case for the establishment of a hospital. Similarly, in the *Burnham, Mohican, Vanderslice,* and *Alhambra* cases,[31] in which certain airport operations were enjoined, the airport involved in each case was small and privately operated while the plaintiff either had his home nearby or, in the *Mohican* case, was operating a large well-established camp for children. As for the two cases in which injunctive relief was granted despite the fact that the

[25] For recognition elsewhere of this distinction between necessary and unnecessary injuries, see HUBBARD, MCCLINTOCK AND WILLIAMS, AIRPORTS—THEIR LOCATION, ADMINISTRATION AND LEGAL BASIS (Harvard City Planning Studies, Vol. I, 1930) 125-131.

[26] For excellent appraisals of the community and national interest in airports, see: RHYNE, *supra* note 5, at 17-31; Ulman, *supra* note 5; SEN. REP. No. 224, 79th Cong., 1st Sess. (April 30, 1945) 9-14; H. R. REP. No. 844, 79th Cong., 1st Sess. (June 30, 1945) 2.

[27] This consideration has had some attention in the opinions of the Federal district and circuit courts in the *Swetland* case, *supra* notes 13 and 14, and in those of the highest Massachusetts and Georgia courts in the *Burnham, Thrasher,* and *Kersey* cases, *supra* notes 16 and 13. Of these opinions, that in the *Kersey* case is particularly recommended for its treatment of this subject.

[28] *Supra* notes 13 and 14.

[29] *Supra* note 14.

[30] *Ibid.*

[31] *Supra* note 16.

airport involved was publicly owned and operated, the *Thrasher* and *Dlugos* cases,[32] the court was careful in each case to limit the injunction issued in such a way as not to interfere materially with operation and use of the airport—a feature also of the relief granted in the *Burnham* and *Mohican* cases.[33] And in another case involving a municipal airport, the *Kersey* case,[34] while the court in finding that the lower court had erred in sustaining the city's demurrer, held that the city had so constructed and maintained the airport "as to require such low flying over the home of the petitioner as to constitute an unreasonable interference with the health of petitioner and his family," it was stated that "if on the trial it should appear that it is indispensable to the public interest that the airport should continue to be operated in its present condition, it may be that the petitioner should be denied injunctive relief."

The same principle is apparent in the airport and low-flying nuisance cases in which relief was denied. For example, while the airport in the famous *Smith* case[35] was privately owned, it was used by the public for charter flights and the low-flying complained of was over unimproved land and therefore caused no actual damage to its owner.[36] In the *Nicholas* case,[37] the public interest in protecting the landowner was greater, he being the owner of a turkey farm, but so was the public interest in preventing interference with the airport, which was municipally-owned. And in the *Batcheller* case,[38] although the plaintiffs' lands were used for expensive residences, they were located some distance from the site of the proposed airport, which was to be established and operated by the University of Virginia, a tax-supported agency.

Is Harmless Low-Flying a Trespass?

This problem of determining whether the landowner should have a cause of action for damages or injunctive relief against the owner of the airport or the flyer using the airport is comparatively simple where the operation of the airport or the low-flying results in actual damage to him. However, the problem is considerably more complicated where the landowner owns the airspace above his land to a height below which aircraft can fly without interfering with his use and enjoyment of his property or otherwise occasioning him actual damage. Where such property rights in airspace exist, it would appear at first glance that each harmless flight through privately-owned airspace is a technical trespass for which the landowner may recover nominal damages and that continued flights of this nature might result in the granting of injunctive relief against the flyer responsible or even against the owner of the airport.

Prior to the development of aviation, the prevailing concept of rights in airspace was expressed by the ancient maxim of the common law *"cujus est solum ejus est usque ad coelum,"* which may be freely translated as "he who owns the land owns

[32] *Ibid.*
[33] *Ibid.*
[34] *Supra* note 17.
[35] *Supra* note 19.
[36] See discussion *infra*, p. 548.
[37] *Supra* note 19.
[38] *Supra* note 13.

up to the sky."[39] However, in the aviation cases involving the flight of aircraft over private property, this rule has been consistently and completely rejected. In lieu of this concept, there appear to be, in general, three possible theories of airspace ownership, each of which has had its advocates in the courts and the many scholars and legal committees that have expressed their views on the subject.[40]

Of these theories, one regards ownership as extending "ad coelum" subject to a public easement for aerial transit at heights not interfering with the reasonable enjoyment of the surface. Another, which is almost the exact opposite of the "ad coelum" theory, is that there is *no* ownership of the unenclosed or unused air space. And the third, the zone theory, simply divides the airspace into two horizontal zones, the landowner owning that contained in the lower zone but not that of the upper. This limit is usually determined either by the height of "possible effective possession" or "effective user," meaning the height to which the owner of the land may erect a structure or otherwise use his property, or by the altitude below which repeated flights of aircraft would constitute a nuisance to the use then being made of the surface.

During the years 1920 through 1926, when the question of the lawfulness of flight was receiving its first serious attention, the prevailing view appears to have been the compromise easement theory. This view was advocated by many scholars and in 1922 was adopted by the American Bar Association and the Conference of Commissioners on Uniform State Laws in drafting the original Uniform State Law for Aeronautics sponsored by those bodies. In that model act, it is expressly provided, as Section 3, that "the ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Section 4." This right is stated in the following language:

"Flight in aircraft over the lands and waters of this state is lawful, unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space above the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath."

These provisions were included in many of the state aviation laws enacted in the years following the drafting of this model act,[41] and in 1934, this theory was accepted by the American Law Institute in its Restatement of the Law of Torts.[42] However, the easement theory has had few advocates and many critics since 1936 and, with three possible exceptions in recent years,[43] has been rejected by all courts consider-

[39] Sweeney, *Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law*, 3 J. OF AIR L. 329-373, 531-625, at p. 347; RHYNE, *supra* note 5, at 94.

[40] The classification of theories used in this paper corresponds to that advanced in Sweeney, *ibid.*, differing somewhat from that followed in RHYNE, *supra* note 5, at 154.

[41] There are still 22 states which have such legislation: Ariz., Ark., Colo., Del., Ga., Idaho, Ind., Md., Mich., Minn., Mo., Nev., N. J., N. C., N. D., Pa., S. C., S. D., Tenn., Vt., Wis., Wyo.

[42] RESTATEMENT, TORTS (1934) §194.

[43] Capitol Airways, Inc. v. Indianapolis Power & Light Co., 215 Ind. 462, 18 N. E. (2d) 776 (1939); Guith v. Consumers Power Co., 36 F. (2d) 21 (E. D. Mich., 1940); *Vanderslice* case, *supra* note 16; cf. the *Dlugos* case, *supra* note 8.

ing the question, include the Supreme Judicial Court of Massachusetts and the Circuit Court of Appeals for the Sixth Circuit, in the famous *Smith* and *Swetland* cases, decided in 1930 and 1931.[44] And shortly after this latter decision, in 1935, both the Conference of Commissioners and the American Bar Association expressly and officially repudiated the easement concept in approving a new Uniform Aeronautical Code.[45]

It was at this stage in the evolution of the law that the no-ownership theory received its greatest support. This came from several legal writers[46] and even from the Aviation Committee of the Conference and the Committee on Aeronautical Law of the American Bar Association in recommending, in 1932, the adoption of the new uniform aeronautical code referred to *supra*.[47] However, neither the Committee in submitting this draft nor the Association in adopting it committed itself to the no-ownership concept, the new code simply omitting Section 3 of the original model act while substantially restating the old Section 4. While this provision is equally consistent with the zone theory, being silent on the question of ownership of airspace, it is clear from the report filed by the two Committees that the no-ownership concept was the one intended.

This theory has received judicial approval in one case, referred to herein as the *First Hinman* case, which was decided by the Circuit Court of Appeals for the Ninth Circuit in 1936.[48] With this one exception, however, this theory has found no support in the courts, and even when adopted by the two Committees, was severely criticized by many writers on the subject. Instead, those writers advocated the theory which is apparently the basis upon which all earlier American cases, including the *Smith* and *Swetland* cases, had been decided—the zone theory. And these cases, with the three possible exceptions noted *supra*,[49] appear to have been followed by all subsequent cases involving the question, including the recent *Burnham* and *Kersey* cases.[50] It therefore appears that the zone theory now represents the law of airspace ownership in most jurisdictions in this country.

But this is not to say that the zone theory is uniformly understood or applied. Rather, the fact is that ever since the *Smith* and *Swetland* cases there have been two opposing schools of thought as to whether the landowner should have any remedy for low-flying which does him no harm. The one advocates the so-called "technical trespass" doctrine, which was first propounded by the Massachusetts court in the *Smith* case,[51] the other, the "nuisance" doctrine, which first found expression in the opinion of the Circuit Court in the *Swetland* case.[52] This difference of opinion has existed ever since, some of the cases apparently supporting the former view

[44] *Smith* case, *supra* note 19; *Swetland* case, *supra* note 14.
[45] 60 A.B.A.R. (1935) 119.
[46] For a recent endorsement of this theory, see RHYNE, *supra* note 5, at 161.
[47] Logan, *Proposed Uniform Aeronautical Code* (1932) 3 J. OF AIR L. 285, 286.
[48] Hinman v. Pacific Air Transport Corp., 88 F. (2d) 755 (C. C. A. 9th, 1936), *cert. den.* 300 U. S. 654 (1937).
[49] *Supra* note 43.
[50] *Burnham* case, *supra* note 16; *Kersey* case, *supra* note 17.
[51] *Supra* note 19.
[52] *Supra* note 14.

and the remainder the other. As recently as 1942, in the year's two appellate court decisions on the subject, the Supreme Judicial Court of Massachusetts expressly reaffirmed the "technical trespass" doctrine,[53] though with qualifications,[54] while the Supreme Court of Georgia for the second time adopted the "nuisance" concept.[55]

Briefly, this difference of opinion is as to whether the action of trespass *quare clausum fregit* should lie for a flight through the landowner's airspace (within the lower zone) which does not result in any substantial damage to him. Both schools of thought agree that in the absence of police regulations or legislation limiting his rights in such matters, he may maintain either an action of trespass or an action of nuisance for any such flight which *does* interfere with the then-existing reasonable use of the land or is dangerous to persons or property on the land, and should have injunctive relief against further nuisances of this character if proper upon application of the "balance of convenience" test of equity.[56] However, while the "nuisance" school takes the position that there should be no remedy whatever unless there is actual interference with the landowner's use and enjoyment of this property, the "trespass" school presumably would allow a trespass action for nominal damages for an isolated flight within a landowner's zone of "possible effective possession" which resulted in no actual damage,[57] and might even enjoin continued flights of this nature.[58] Whether the cause or the effect of adoption of these views, those holding to the "technical trespass" rule place the limit of ownership of airspace at the height to which the landowner may reasonably occupy and use the airspase above his land,[59] while the proponents of the "nuisance" concept fix this limit at the height below which the flight of aircraft would be annoying or otherwise injurious to the landowner.

While it would therefore appear that harmless low-flying might conceivably be actionable and even restrainable in some jurisdictions, at least in theory, there is reason to believe that few if any courts will grant relief where the flying does not result in or threaten actual damage to the landowner. For one thing, many of the states have legislation and regulations which should have the effect of narrowing the zone of "effective possession." To the extent that the height of structures may be limited by regulation,[60] it would seem that the height of "effective possession" can be no higher than the limit prescribed by any applicable state, municipal, or

[53] *Burnham* case, *supra* note 16. [54] See discussion *infra*, p. 550. [55] *Kersey* case, *supra* note 17.

[56] This is well brought out in the *Kersey* case, *supra* note 17 and the *Burnham* case, *supra* note 16.

[57] Such a result was actually reached in the *Burnham* case, *supra* note 16.

[58] While the court in the *Burnham* case, *supra* note 16, refused to enjoin low-flying over unimproved lands of the petitioner, it did restrain flying below 500 ft. over the petitioner's home and improved lands despite the fact that no actual damage had been proved.

[59] In both the *Smith* and *Burnham* cases, *supra* notes 19 and 16, the Massachusetts court set this limit at 500 ft., doing so on the theory that the 500 ft. limit of the Federal and state minimum altitude of flight regulations had the effect of determining the property rights of landowners in airspace. But cf. the *Swetland* case, *supra* note 14. This theory of the Massachusetts court has been severely criticized on the ground that it confuses a criminal liability of flyers with a civil right of property owners. See RHYNE, *supra* note 5, 118, 157-159.

[60] See discussion *infra*, p. 550, *et seq.*

county airport zoning regulation or other height regulation.[61] Moreover, several of the states have enacted the provision of the 1922 Uniform State Law for Aeronautics declaring the flight of aircraft to be lawful so long as there is no actual damage to the landowner beneath,[62] which likewise might preclude suits for nominal damages.[63] And as a third and a more certain means of insuring such a result, the Council of State Governments, upon the recommendation of the Civil Aeronautics Administration,[64] is now urging state legislation expressly forbidding the maintenance of a cause of action for harmless flight.[65]

In this connection, however, it is noteworthy that the Massachusetts Court so qualified its "technical trespass" doctrine in the *Burnham* case as to permit it to reach the same result in future cases as would be reached by a court following the "nuisance" rule. This it did in stating that it may be that flight in the vicinity of an airport beneath the lower level of the "navigable air space" would not be a trespass if "substantially harmless and . . . justified upon striking a reasonable balance between the landowner's right to exclusive possession free from intrusion and the public interest in necessary and convenient travel by air."[66] It thus appears that the Massachusetts Court by its insistence upon the "technical trespass" doctrine, finds itself in the strange position of determining whether a flight is a technical trespass by application of the balancing test suggested *supra* for use in airport nuisance cases.[67]

Is the Airport Hazard Preventable by Injunction or Regulation?

Regardless of which of these theories of airspace rights is applied, however, there is still the problem of preventing the establishment of approach obstructions and other airport hazards.[68]

In establishing a new airport or enlarging an existing one, the owner should be able to acquire such property rights as are necessary to permit the removal or elim-

[61] While the police power, as a general rule, cannot be exercised to acquire a public right to use the property regulated, and while the imposition of a height limit by zoning regulation certainly would not deprive the landowner of his remedies for low-flying amounting to a nuisance, it appears that in a jurisdiction applying the "effective possession" zone theory, such a regulation would have the effect of lowering the ceiling of the zone within which a flight would be a trespass. This is borne out by the dictum of the *Burnham* opinion quoted *infra* at note 98.

[62] These are the 22 states listed in note 41 *supra*, plus Massachusetts which has enacted the lawfulness of flight provision of the 1935 Uniform Aeronautical Code (*supra* note 45).

[63] Although the existence of such a statutory provision (see note 62 *supra*) did not have this effect in the *Burnham* case, *supra* note 16.

[64] Occasioned apparently by the result reached in the *Burnham* case, *supra* note 16.

[65] The legislation proposed is a so-called "Harmless Flight of Aircraft Act," reading as follows: "No cause of action at law or in equity based upon flight in aircraft over lands or waters of this state shall be maintained unless other than nominal damage results therefrom or unless irreparable damage will probably result therefrom." COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE POSTWAR LEGISLATION, FEDERAL-STATE PROGRAM FOR 1946-1947 (Dec. 1, 1943) A-1.

[66] In applying this test to the facts of the *Burnham* case, the court pointed out that the airport in question was a "private airport."

[67] *Supra* at note 24.

[68] Even in a jurisdiction subscribing to the no-ownership theory, it appears that the landowner's right to use the airspace above his land is paramount to the right of anyone else to do so (with the qualifications noted *infra*). *First Hinman* case, *supra* note 48.

ination of the then existing hazards. In fact, it appears that in the usual case this would be the only way in which such hazards could be eliminated legally.[69]

On the other hand, however, it would not be feasible, due largely to the cost involved, for the airport owner to acquire all the property interests which would be necessary (if this were the only method to be employed) in order to prevent the further creation of additional hazards or compel the removal of such hazards when established.[70] Nor is this legally necessary.

For one thing, it is clear that the courts will enjoin both the erection and maintenance of airport obstructions established with the intent of preventing or interfering with necessary low-flying. In all three of the cases which have been decided in which such intent was proved, the court granted an injunction compelling removal of the offending structures and forbidding the further erection of such structures.[71] In one of these cases,[72] the landowners' purpose was to force the airport owner to purchase their property on their own terms, and in the others, to prevent the continuance of low-flying which they considered a nuisance.[73] In one of them,[74] the court pointed out that the erection or maintenance of structures and trees with intent to make it dangerous to use the airport "would not constitute a proper use and enjoyment of the defendant's premises and would not be necessary for its enjoyment." And in all three cases, the court expressly declared that any such spite obstruction would be a public nuisance.

Conversely, however, if spite or other improper motive is not shown and there is no valid regulation forbidding the erection of the obstruction, it appears that both injunctive relief and damages will be denied. Such a result has been reached in three additional cases involving an action to enjoin, or recover damages for, the erection of an airport hazard.[75]

But this does not mean that there are no circumstances in which a landowner

[69] This proposition finds support in the statement of the Circuit Court in the *Swetland* case, *supra* note 14, that a private person cannot lawfully establish an airport where its normal operation would deprive nearby landowners of the use and enjoyment of their property unless the site is "indispensable to the public interest" and in the holding of the Georgia Supreme Court in the *Kersey* case, *supra* note 17, that a city in establishing an airport must acquire enough land, and so construct the airport, that its operation will not impose unnecessary burdens upon adjoining landowners. Concerning the validity of retroactive airport zoning regulations, see RHYNE, *supra* note 5, at p. 188, and authorities there cited.

[70] This is well brought out in an "interpretative statement" issued by the Council of State Governments in support of the CAA-NIMLO model airport zoning act, in which it is pointed out that this method of protecting airport approaches would require the acquisition of acreage as much as fourteen times that necessary for the airport proper. COUNCIL OF STATE GOVERNMENTS, *supra* note 65, at B-75.

[71] City of Iowa City v. Tucker, 1936 U. S. Av. Rep. 10 (Dist. Ct. Johnson Co., Iowa, 1935); Commonwealth v. Von Bestecki, 43 Dauphin Co. Rep. 446, 1938 U. S. Av. Rep. 1 (Ct. Com. Pl. Dauphin Co., Pa., 1937); United Airports Co. of Cal., Ltd. v. Hinman, 1940, U. S. Av. Rep. 1, 235 CCH 1858 (U. S. Dist. Ct., S. Dist. Cal., 1939), referred to herein as the *Second Hinman* case.

[72] The *Second Hinman* case, *supra* note 71.

[73] In the *Von Bestecki* case, *supra* note 71, the court pointed out that the landowner had a remedy at law or in equity if the low-flying constituted a trespass or nuisance, and refused to allow self-abatement of a nuisance as a defense.

[74] The *Tucker* case, *supra* note 71.

[75] Air Terminal Properties v. City of New York, 16 N. Y. Supp. (2d) 629 (N. Y. Sup. Ct. 1939); *Capitol Airways* case, *supra* note 43; *Guith* case, *supra* note 43.

may be prevented, without compensation, from using his property in a normal manner, without improper motive, where such use would be an airport hazard. Rather, it is submitted that under certain conditions and with certain limitations, the state police power may be exercised to prevent the establishment of such airport hazards whether this is accomplished by comprehensive city or county zoning regulations or by airport zoning regulations having as their sole purpose the prevention of airport hazards.[76]

This method of protecting the aerial approaches of airports has been recommended by the Civil Aeronautics Administration for many years. More specifically, that agency since April, 1939, has urged the enactment in each state of a model airport zoning enabling act drafted jointly by it and the National Institute of Municipal Law Offices, the most recent draft of which is dated November 7, 1944,[77] and the adoption by cities and counties of a companion model airport zoning ordinance. With the active endorsement and support of many persons and organizations,[78] including the Council of State Governments,[79] this model act or substantially similar legislation has now been enacted by the Legislatures of 24 States and the Territories of Alaska and Hawaii,[80] and by the governing bodies of many political subdivisions.

The CAA-NIMLO model airport zoning act is carefully drafted to ensure the constitutionality of acts patterned thereon. This is evidenced by many of its provisions, including its legislative declarations of policy and findings of fact,[81] its provision expressly requiring that all regulations be reasonable,[82] its many provisions concerned with notice, hearings, and other procedural matters, non-conforming uses[83] and permits and variances,[84] and its detailed provisions concerning appeals and judicial review.[85] It is apparent from these provisions that the drafters of this model act have profited by the experience of the proponents of comprehensive zoning in meeting the requirements of "due process."

In addition, it is worthy of note that neither the Civil Aeronautics Administration nor any of the other advocates of airport zoning considers such zoning a complete answer to the problem.[86] Rather, those organizations recognize that an airport zoning regulation, like any other exercise of the state police power, must be reasonable in its effect upon private property rights.

If an airport zoning ordinance were to prescribe too low a height limit or attempt to compel the removal or lowering of an existing obstruction or otherwise interfere with a non-conforming structure or use, it undoubtedly would be held to be an un-

[76] For excellent analyses of the law of airport zoning, see: RHYNE, *supra* note 5, 164-190; Lord, *Validity of Prospective Airport Zoning* (1942) 31 GEO. L. J. 105; Note, *Constitutionality of Zoning Laws Enacted to Protect Airport Approaches* (1942) 13 J. OF AIR L. & COMM., 272.

[77] MODEL STATE AIRPORT ZONING ACT (Nov. 7, 1944), Civil Aeronautics Administration and National Institute of Municipal Law Offices, footnote 1.

[78] *Ibid.*

[79] COUNCIL OF STATE GOVERNMENTS, *supra* note 65, at B-75.

[80] *Supra* note 6.

[81] Sec. 2 of Model Act cited *supra* note 77.

[82] *Id.* Section 6(1).

[83] *Id.* Section 6(2) and footnote 9.

[84] *Id.* Section 7.

[85] *Id.* Sections 8, 10, 11.

[86] COUNCIL OF STATE GOV'TS, *supra* note 65, at B-75.

constitutional taking of private property without just compensation.[87] And since CAA standards call for unobstructed airspace above a 30 or 40 to 1 flight path beginning at the end of the runway at ground level,[88] it seems clear that a height limit as low as that necessary could not legally be imposed by the zoning method for some distance from the end of the runway, this distance depending upon many factors such as the use made of property in the neighborhood.[89] It is therefore recognized by the proponents of the model airport zoning act that the airport zoning method must be used in conjunction with, and supplemented by, the acquisition of property or avigation easements, in order to achieve complete protection for an airport's approaches.[90]

As another limitation of airport zoning, it appears that there is very little that can be done by this method to protect the approaches of privately-owned airports which are not available for use by the general public.[91] This also is recognized by the CAA-NIMLO model act, it being drafted to authorize the adoption of airport zoning regulations for the protection of only those airports which are "utilized in the interest of the public."[92]

Whether and to what extent such airport zoning is a proper exercise of the police power are questions which have not yet been settled by the courts, despite the fact that there are many airport zoning acts and ordinances which have been in effect for years, some of them since 1928.[93] However, there have been two reported cases on the constitutionality of airport zoning regulations, the *Newark* case[94] and the *Baltimore* case,[95] one case in which the existence of such regulations influenced the outcome,[96] and one, the *Burnham* case,[97] in which the Supreme Judicial Court of Massachusetts expressed the opinion, by way of dictum, that the Massachusetts airport zoning act "contains adequate provisions for securing and regulating the approach to public airports."[98]

In the *Newark* case, the Supreme Court of New Jersey held unconstitutional an airport zoning ordinance of the City of Newark. However, that decision was on

[87] See discussion *infra*, p. 554.

[88] See discussion *supra*, p. 540.

[89] See discussion *infra*, p. 554.

[90] See Model Act, *supra* note 77, footnote 17 and COUNCIL OF STATE GOV'TS, *supra* note 65, at B-75. That the model act was clearly drafted in this thought is indicated by its inclusion of a section (Section 13) authorizing the acquisition of air rights, avigation easements, and other property interest where "it is desired to remove, lower, or otherwise terminate a non-conforming structure or use" or when "the approach protection necessary cannot, because of constitutional limitations, be provided by airport zoning regulations under this Act." See also Section 11(6) of the Model Act.

[91] U. S. DEPT. OF COM., REPORT OF COMMITTEE ON AIRPORT ZONING AND EMINENT DOMAIN (Dec. 18, 1930) 6, 7.

[92] Model act, *supra* note 77, Section 1(1).

[93] See RHYNE, *supra* note 5, at 169-176.

[94] Yara Engineering Corp. v. City of Newark, 235 CCH 1989 (N. J. Sup. Ct., Jan. 8, 1945).

[95] Mutual Chemical Co. v. Mayor and City Council of Baltimore, 235 CCH 1821 (Cir. Ct. No. 2, Balt., Jan. 25, 1939).

[96] United States v. 357.25 Acres of Land, 235 CCH 1972 (U. S. D. C. W. D. La., 1944). In this condemnation case, the court upheld a jury award of "no dollars" as damages for the taking of a 25-40 ft. avigation easement in lands adjacent to an airport used by the Army, stating that since a Parish airport zoning ordinance had already limited the height of buildings on those lands to 25 ft., the taking did not result in any appreciable diminution in the value of the claimant's property.

[97] *Supra* note 16.

[98] *Id.* at 42 N. E. (2d) 579.

the ground that the city lacked the power to adopt such an ordinance in the absence of state enabling legislation.

In the *Baltimore* case, a Maryland airport zoning act was held unconstitutional in its application to property adjacent to the Baltimore Municipal Airport. This holding was in part on the ground that the height limits of the statute were a taking of the landowner's property, as in fact they undoubtedly were, being as low as five feet as to portions of the property zoned. However, the court also held that airport zoning was not for a public purpose, stating that ". . . the zoning of the area surrounding an airport is rather for the benefit of those who desire to use aerial transportation and for those who own airplanes than for the general public." It is submitted that this flies directly in the face of the many court decisions on the public nature of airports,[99] disregards the numerous cases supporting closely analogous police regulations,[100] and overlooks completely the great public interest in aviation and airports and the injury to that interest that results from the creation of an airport hazard.

The correct view, it is submitted, is that a reasonable airport zoning regulation may be sustained both as a regulation for the public health and safety and as a regulation for the general welfare. Once it is realized that most if not all people have a large stake in aviation, including those who do not fly as well as those who do, there should be no difficulty in arriving at this conclusion.[101]

The really difficult question, however, is how restrictive can an airport zoning regulation be in its effect upon the use of private property without being unreasonable and therefore invalid.

Space does not permit an analysis of the legal principles governing the determination whether a police regulation is reasonable. Suffice it to say that here again the problem, in its last analysis, appears to be one of balancing two conflicting public interests in each particular application of an airport zoning regulation. The one of course is the public interest in accomplishing the desired result, requiring that there be taken into account such considerations as the value of the airport to the community and the general public, its adequacy for safe aircraft operations, and the effect upon its safety and utility of a use of the property in question in a manner prohibited by the regulation. The other is the public interest in protecting and preserving the landowner's property rights requiring consideration of the nature of the uses to which his property is put and adaptable, the extent to which those uses are limited

[99] See Ulman, RHYNE, *supra* note 5. [100] See note 24 *supra*.

[101] While it has been contended that airport zoning does not satisfy the community benefit or reciprocal advantage requirement which the courts have applied in the comprehensive zoning cases, it appears that this may be answered on two lines of reasoning: (1) the law does not require that the losses and burdens resulting from zoning regulations be equal as to all landowners affected or that there be a compensating benefit to each such landowner offsetting the limitation placed upon his rights, a regulation being for the general welfare if it results in overall benefit to the entire community (which is certainly true of airport zoning); and (2) a showing of community benefit is unnecessary in the case of a regulation which is primarily and directly necessary for the public health and safety (as is airport zoning), as distinguished from a regulation which is primarily for the general welfare and only incidentally for the public health and safety (such as comprehensive zoning).

by the regulation, and the injury suffered by the landowner as a result. In other words, it is submitted that a conflict of the interests of airport owner and nearby property owner which arises out of an attempt of the former to prevent some use of the latter's property that would result in an airport hazard must be adjusted or settled by application of fundamentally the same test as that used in determining whether the airport or some airport operation is a nuisance to the landowner.

Since this balancing test is only a very general guide rather than a formula or yardstick and since a court, in applying it in a particular case, would still have to determine and weigh the facts and considerations involved, in the light of its own concepts of the best interests of society, it is dangerous to generalize as to the extent to which the approaches of airports may be protected by the airport zoning method. However, it seems safe to say that in the case of a properly enacted airport zoning regulation for the protection of a large terminal airport owned and operated by a municipality and used extensively by the public, it would be reasonable to impose a height limit as low as 35 feet above grade if the property so zoned was used for a residence of the story and a half type and this was the usual type of building in the neighborhood. If such land was used only for agricultural purposes, this height limit might be even lower; if for commercial or manufacturing purposes, it would have to be considerably higher.

If height limitations as exacting as those suggested may be imposed, it is apparent that police power airport zoning offers an effective means of solving the problem of protecting airport approaches.

AVIATION LAW COMES HOME TO THE MAIN STREET LAWYER

JOHN C. COOPER*

Over the past two decades many ambitious young men have asked, "What should I study to become an aviation lawyer?" Even ten years ago I tried valiantly to answer and felt I had done so fairly well. Now I am not so sure.

Whether such a subject for separate study as "aviation law" exists seems now a very debatable question. Aviation is nothing more than another form of transportation—aircraft the mobile instruments employed, airports; the passenger and freight stations or docks used. The legal principles applicable to aviation generally, and air transport, particularly, range through the old student categories of contracts, torts, personal property, real property, etc., with, however, occasional jolts from unexpected and somewhat concealed statutory, regulatory or treaty provisions. And it is the average practitioner at the bar, rather than the student or specialist, who may get the jolt.

Comparatively few companies are engaged solely in aviation—manufacturing or transport. If consolidations continue, as will probably occur, such companies will be fewer and not more. The number of lawyers on their staffs will always be limited. But as aviation continues to grow and air transport becomes a more integral part of the normal life of the business and social world, lawyers in the big cities and the small towns will more and more frequently be called on to advise their regular clients on its problems—and a "crack-up" may well result. The purpose of this article is to point out a few of the danger signals.

It seems only yesterday that I first read an advance sheet copy of the opinion of the U. S. Supreme Court in *Adams Express Co. v. Croninger*.[1] The intervening 32 years have never quite effaced the mental shock. It happened to be my first experience, in practical form, of the ability of Congress under the "Commerce Clause" to take over a field involving everyday business relationships (in that case, between shipper and common carrier) and set aside completely the common law and state statutes as I had known them. Certain statements of the court have always remained with me:

* A.B., 1909, Princeton University. Member of the Institute for Advanced Study, Princeton, N. J., 1945—. In private law practice, 1911-1934. Vice-President, Pan American Air Ways, 1934-1945. Chairman, Committee on Aeronautical Law of American Bar Association, 1932-1935. President, Florida State Bar Association, 1931. Chairman of Executive Committee of International Air Transport Association. Member of the Florida and U. S. Supreme Court Bars, American Law Institute.

[1] 226 U. S. 491 (1913).

"The question upon which the case must turn, is, whether the operation and effect of the contract for an interstate shipment, as shown by the receipt or bill of lading, is governed by the local law of the State, or by the acts of Congress regulating interstate commerce.

"That the constitutional power of Congress to regulate commerce among the States and with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury or damage to such property, needs neither argument nor citation of authority.

"But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular State, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the State. Such regulations would fall within that large class of regulations which it is competent for a State to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected."[2]

And again:

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its condeded authority, the regulating power of the State ceased to exist."[3]

Congress having intervened and by Federal regulation occupied the field, woe to the lawyer who thereafter advised his client based on his predetermined views of the common law, or the statutes of his state.

And so my first advice to the average practitioner at the bar is this: If a client wants advice, or is involved in litigation concerning aviation in any of its phases, postpone your decision until you re-read the "Civil Aeronautics Act of 1938"[4] (assuming that you have ever read it). In that act, Congress has quite effectively taken over the regulation of many of the phases of aviation. And this is true to an extent that may be found rather surprising.

Suppose, for example, that you represent a local bank in a small county seat. Your client undoubtedly makes occasional loans on chattel mortgages. The bank has a customer who has purchased an airplane to use locally, for instance in dusting farm crops in the vicinity. The customer needs some funds for further business expansion and offers his airplane as security. The bank approves the loan, sends the customer to you to draw the chattel mortgage. This is done. You search the records at the courthouse, find no judgments against the customer, approve the loan

[2] *Id.* at 499-500.
[3] *Id.* at 505-506.
[4] 52 STAT. 973 (1938), 49 U. S. C. (1940 ed.) §401 *et seq.*

and advise the bank to record the chattel mortgage under your state statute just as would be done on farm machinery, or other similar collateral. All goes well until a few months later when the bank hears that the customer has had some disastrous losses and a petition in bankruptcy has been filed against the customer by creditors in an adjoining county. Then your troubles begin.

The attorneys for the unsecured creditors challenge the bank's mortgage, claiming that the creditors had no actual knowledge of its existence, and citing Sec. 503(b) of the Civil Aeronautics Act[5] as follows:

"(b) No conveyance made or given on or after the effective date of this section, which affects the title to, or interest in, any civil aircraft of the United States, or any portion thereof, shall be valid in respect of such aircraft or portion thereof against any person other than the person by whom the conveyance is made or given, his heir or devisee, and any person having actual notice thereof, until such conveyance is recorded in the office of the secretary of the Authority. Every such conveyance so recorded in the office of the secretary of the Authority shall be valid as to all persons without further recordation. *Any instrument, recordation of which is required by the provisions of this section, shall take effect from the date of its recordation, and not from the date of its execution.*" (Emphasis supplied.)

The chattel mortgage not having been recorded with the Civil Aeronautics Authority in Washington, the validity of the lien is certainly open to serious attack by the unsecured creditors having no actual notice of its existence. In the absence of any decision which has yet come to my knowledge, I suspect that the bank will lose its lien and that you will lose a client. (Any views to the contrary will be welcome—there was a time when I represented a bank.) In any event, be safe and record any instrument affecting title to an aircraft with the CAA in Washington.

Assuming that you weathered that jolt (or knew the answer in advance) and still represent the bank, your troubles are not yet over. This time the bank decides to lend some money on a nice real estate mortgage. A new airport is being laid out in a nearby town and a customer of the bank owns adjoining property which appears suddenly valuable. The customer has a very bright idea. New airport—new travelers into that part of town—hotel needed—in fact, a nice four-story brick hotel. The plans are drawn, and the bank will loan the money. All you do is to approve the title for the bank or the local title insurance company. You search the records and everything is clear. The mortgage is closed. The bank's customer lets a firm building contract and construction on the hotel starts—and suddenly stops. An injunction has been served on the building contractor and the bank's customer, owner of the property. Then everyone becomes very unhappy—the contractor, the owner, the bank, and particularly you. For the injunction papers disclose the fact that the location of the customer's hotel is directly in line with the end of what will be the most used runway on the airport, that the thoughtful municipal authorities coincident with establishing the airport had adopted a local zoning ordinance limiting the height of structures adjacent to the airport—and that the hotel as planned

[5] 52 STAT. 1006 (1938), 49 U. S. C. (1940 ed.) §523(b).

violate the zoning regulations. The fact that you never heard of this regulation is not going to help very much. When you examine the cases and the textbooks,[6] you find that the ordinance is probable valid as a "reasonable exercise of the police power of states and local governments,"[7] that no compensation can be collected by the landowner—and that he is probably going to be sued by the building contractor. What happens to the banker and you, his lawyer, is fortunately not my worry. This is written in the shadow of scholastic quiet where such matters seem far away.

An examination of the Civil Aeronautics Act might possibly have been helpful. For you would have found that the Federal government had *not* sought to regulate airport zoning, even could it practically or constitutionally do so. The field was therefore left to the state or local governments, as the case might be. And the moral is—wherever you see an airport, be sure to find out the status of restrictions on the use of nearby real property before you approve another mortgage or accept a title.

But these difficulties are quite simple compared to another field into which you as a lawyer with a normal general practice may unexpectedly be plunged. Few of us have not at times been called on to advise a client on the right to or extent of recovery arising from the death of or injury to a passenger, or damage to or loss of baggage or cargo. If the carrier involved is an air carrier, you will be very wise to determine immediately whether the transportation in question involved directly or indirectly actual or intended carriage beyond the forty-eight states of the continental United States. If you find that a simple intrastate or interstate movement is alone to be considered in connection with the accident or loss involved, you have (as yet) no general Federal statutory intrusion into the field of procedure or right of recovery normally covered by your state statutes or decisions. You will note, I stated "as yet." Actually, legislation is now pending in the Congress which, if passed, might change the situation to some extent.

But if, in getting the facts from your client, you find that the air transport movement in question involved a trip or shipment actually or intended to extend beyond the forty-eight states, quite a different situation must be faced. You must deal with an almost unique situation in our jurisprudence in which the Constitution of the United States, and the treaty making power delegated through it to the Federal government, have preempted a field of commercial relations and thereby set aside all common law or state statutory rights and remedies otherwise applicable.

The provisions of Article VI, paragraph 2, of the Constitution are, or were in student days, familiar to us:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[6] RHYNE, AIRPORTS AND THE COURTS (1944). See also Hunter, *The Conflicting Interests of Airport Owner and Nearby Property Owner, supra* this symposium, p. 539.

[7] RHYNE, *supra* note 6, at 189.

But the effect of this provision, so far as a treaty being part of the "supreme Law of the Land" is something which is not often brought home to the average lawyer. Briefly, the signature of, or adherence to, a treaty by the United States, and subsequent ratification, without further act of Congress can quite effectively amend prior inconsistent Federal legislation and set aside all conflicting state statutes. And this is exactly what has occurred in reference to the rights and remedies of passengers and shippers in international air transport.

In 1943 the United States by adherence under the constitutional procedure applicable became a party to and hence bound by the so-called "Warsaw Convention," more formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air."[8] Before you ever advise another client on the rights of passengers and shippers against an air carrier, read the treaty very carefully. Otherwise, you will get a most unexpected and unpleasant jolt. Because without an accurate understanding of its provisions, you cannot possibly decide what constitutes "international transportation" by air, nor the rights of your clients.

The Warsaw Convention was signed at an international conference held in 1929, at which most of the principal nations of the world were represented, except the United States. It was part of a general international program initiated at an earlier conference in Paris in 1925, having for its object uniformity of private air law throughout the world. The advisability, if not necessity, of such uniformity is obvious. And a series of multilateral treaties, each dealing with one subject, was wisely determined to be the only sound method of attaining such international uniformity. Later conferences were held at Rome in 1933[9] and at Brussels in 1938 to consider other treaties in the contemplated series. But these have not yet been ratified by the United States.

At the outbreak of World War II the Warsaw Convention was in force through most of Europe (except Portugal), Australia, New Zealand, India, British, French and Dutch colonies, Mexico and Brazil, as well as the United States. In the extent of its territorial effect and importance of its subject matter, it takes first rank in the various existing pieces of private international air law. If at any time you are in doubt as to the extent of its coverage, the Department of State will furnish you with a down-to-date list of the countries in which it is effective. Without this information you are quite helpless to determine whether a particular cause of action is or is not governed by its terms. For the convention, before setting out the detailed rights of passengers and shippers and the liability of the carrier, thus defines the scope of the convention and the term "international transportation":

"(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

[8] The official French text, with English translation will be found in U. S. Treaty Series 876, 49 STAT. 3000 (1936), Eng. trans. at 3014. Also in 1934 U. S. Av. R. 245.

[9] The writer of this article was chairman of the United States Delegation to the Rome Conference

"(2) For the purposes of this convention the expression 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

"(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party."[10]

An examination of the above provisions discloses among other things, the following:

(a) The convention applies equally to transportation for hire and to gratuitous transportation. (Query: Does it thereby set aside the customary "no liability" pass agreements?)

(b) The contract of carriage of the passenger or shipper, not the destination of the aircraft, will determine whether the convention applies in a particular case. Consequently, in an airplane scheduled from Country A to Country B, thence to Country C, when A and C but not B are parties to the convention, the airplane having crashed between A and B, passengers with tickets to B as destination are not covered by the convention, while those destined for C are covered.

(c) In an airplane scheduled from a point in Country A (party to the convention) via a point in Country B (not a party to the convention), thence to another point in A, passengers with tickets to B are not covered, while those with tickets to the last stop in A are covered, although *their departure and destination points are in the same country.* (Your client proceeding from the United States by air to Alaska via a Canadian stop is covered. If the flight to Alaska is non-stop, he is not covered!)

(d) Paragraph (3) above—transportation by successive carriers—is open to varying interpretations—all difficult. Your client is proceeding from Chicago to London via New York. The trip from New York to London is certainly covered by the convention. He takes a ticket from Carrier X from Chicago to New York, and requests Carrier X to make a reservation on Carrier Y from New York to London. The passsenger is injured while a passenger with Carrier X between New York and Chicago, an interstate operation.

[10] U. S. Treaty Series 876, pp. 16-17, 49 STAT. 3014-3015 (1936).

But is the entire trip "regarded by the parties as a single operation" so that the convention applies? Please do not quote me as advising you—you are advising the client, and I am (again in the safety of scholastic quiet) simply pointing out the danger signals.

Having decided that your client's case is covered by the convention, an examination of its later technical provisions will disclose that it:

(a) Requires certain forms of passenger tickets, baggage checks, and air way bills to be used by the carrier;

(b) Declares the carrier liable for death or injury to passengers, damage to or loss of baggage or goods (as well as delay); but the carrier can rebut such presumption of liability by proving that "he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures"; that as to goods and baggage, the carrier has an additional defense if he proves "that the damage was occasioned by an error of piloting, in the handling of the aircraft, or in navigation, and that in all other respects he and his agents have taken all necessary measures to to avoid the damage"; that the defense of contributory negligence will be applied by the trial court under local law;

(c) Limits the liability of the carrier in terms of gold francs so that such limitation is approximately $8,300 for death or injury of a passenger, and $16.60 per kilogram for loss of or damage to goods or baggage;

(d) Makes void any agreement to relieve the carrier of liability or to fix a lower limit than stated above;

(e) Prevents the carrier from limiting his liability if the damage is caused by his "wilful misconduct" or that of his agent within the scope of his employment;

(f) Provides for the place at which action may be brought and fixes a two-year statute of limitation.

In no event should you rely on this summary. The convention is quite technical and must be carefully read. The sole purpose here is to give you a very general outline of its scope and importance. You will at least note, however, that within its field, the treaty has fully taken over practically every important right or remedy as between the carrier on the one side and passengers and shippers on the other.

Technically the treaty is self-executing. No statute was passed, nor was one needed to put it into effect. As part of the "law of the land" under the Constitution, it overrides and entirely displaces state statutes or decisions as fully as if it had been enacted by Congress under the Commerce Clause of the Constitution. If you have occasion to consider the Warsaw Convention in more detail, some of the pertinent authorities are cited below.[11]

[11] Wyman v. Pan American Airways, 181 Misc. 963, 43 N. Y. S. (2d) 420 (1943), *aff'd* 293 N. Y. 878, 59 N. E. (2d) 785, *cert. den.* 324 U. S. 882 (1945); Indemnity Ins. Co. of No. America v. Pan American Airways, 58 F. Supp. 338 (S. D. N. Y. 1944); Garcia v. Pan American Airways, 269 App.

The three examples cited in this brief discussion include, as you have noticed, one situation (created by certain provisions of the Civil Aeronautics Act) in which Congress under the Commerce Clause, has preempted part of the "aviation law" field; a second (airport zoning) in which it has left another part of the field to state and municipal authorities; and a third (the Warsaw Convention) in which the exercise by the Executive and the Senate of the treaty making power of the United States has taken from the states still another part of the field.

If Congress should amend the Civil Aeronautics Act to include provisions for interstate carrier liability similar to those applicable under the Warsaw Convention to international operations, or if the Senate should ratify the Rome Convention as to liability for damage to third parties on the ground, and the lesser known Rome Convention which limits the rights to attach (prior to judgment) aircraft used in international commerce, then additional parts of the aviation law field will be removed from the states and be unified by Federal action. These are problems which the average lawyer must understand if he is to advise a client whose rights or remedies are affected.

This discussion has purposely omitted many problems, both statutory and regulatory, which are of great importance but applicable largely to the practice of the aviation law specialist, as, for example, such questions as obtaining certificates of convenience and necessity by a carrier before engaging in air commerce, pilots' and other airmen's licenses, safety regulations, etc. In all of these, and many other technical sectors, Congress has by legislation or delegation of regulatory powers preempted the field to the exclusion, more or less, of the states. But such questions are not of the same day-to-day concern to the average lawyer. His problem arises when aviation affects his client who is engaged in quite other lines of endeavor. Perhaps these rather desultory remarks may save such a lawyer some future embarrassment.

Div. 287, 55 N. Y. S. (2d) 317 (1945), motion for leave to appeal to Court of Appeals granted, 56 N. Y. S. (2d) 526 (July 18, 1945); Grein v. Imperial Airways, Ltd. [1936] 2 A. E. R. 1258, 52 T. L. R. 681, 155 L. T. 380, 1936 U. S. Av. R. 211; Latchford, *The Growth of Private International Air Law* (1945) 13 GEO. WASH. L. REV. 276; Latchford, *The Warsaw Convention and the C.I.T.E.J.A.* (1935) 6 J. OF AIR L. & COM. 79; Orr, *The Warsaw Convention* (1945) 31 VA. L. REV. 423; Sack, *International Unification of Private Law Rules on Air Transportation and the Warsaw Convention* (1933) 4 AIR L. REV. 345; GOEDHUIS, NATIONAL AIR LEGISLATION AND THE WARSAW CONVENTION (1937); TOMBS, INTERNATIONAL ORGANIZATION IN EUROPEAN AIR TRANSPORT (1936) 130-135.

LEGISLATIVE PROGRAM FOR AVIATION

STUART G. TIPTON*

BACKGROUND OF EXISTING LEGISLATION

Federal legislation dealing with aviation has been remarkably successful, particularly when one considers the dynamic character of the industry with which Congress was dealing in enacting these statutes. There have been few more difficult drafting jobs than those presented to the draftsmen of our Federal aviation legislation for no one has been able to forecast the future of aeronautical development for a period more extensive than a few months. Notwithstanding this, two major regulatory statutes have been adequate to guide, promote, and control the development of aviation in this country from its earliest beginnings to the present advanced state when aircraft cross the violent North Atlantic with the regularity and almost the frequency of trolley cars.

The first of these statutes was the Air Commerce Act of 1926.[1] Its preparation must have caused its authors many anxious moments. The primary purpose of the statute was to provide for the regulation of aviation from a safety standpoint. While the authors drew heavily upon the general principles of our shipping laws, they very wisely made the Air Commerce Act much more general in its terms. The statute provided for the examination and inspection of aircraft and the issuance of certificates of airworthiness for them. It authorized the issuance of certificates attesting the competence of airmen, such as pilots and mechanics. The promulgation of air traffic rules was authorized and the registration of aircraft provided for. All this was done in very general terms with the Secretary of Commerce given broad powers of regulation and broad discretion in determining the airworthiness of aircraft and the competence of aviation personnel.

The decision to regulate in this way was a wise one because the administrative agency was thus empowered to adjust its regulations to this rapidly developing field. The Secretary was able to issue airworthiness certificates for the wood and fabric airplanes of the day of the Act's enactment and was able to follow the development of the aircraft during succeeding years until a decade later when the DC-3, even now the standard airline airplane, was given its certificate. With very minor amendments in the law, the administrative agency was able to supervise and regulate the airlines as they developed from the carriage of mail in single-engine aircraft to the inauguration of the transpacific operations in huge flying boats.

* A.B., 1932, Wabash College; J.D., 1935, Northwestern University Law School. Member of Indiana Bar. General Counsel, Air Transport Association of America.

[1] 44 STAT. 568 (1926), 49 U. S. C. (1941) §171 *et seq.*

Finally, however, the lusty infant burst its seams. By 1938 the Air Commerce Act of 1926 was no longer adequate and the Civil Aeronautics Act of 1938[2] was proposed and passed. Its major contribution to the regulation and development of aviation was the inauguration of economic regulation. This subject had not been touched in the Air Commerce Act of 1926. While airlines under the latter Act were required to meet strict safety requirements, no effort had been made to impose upon them the traditional public utility regulation. The Civil Aeronautics Act accomplished this and apparently just in time for the evidence presented to the Congress while that Act was being considered clearly showed that this nation's airlines were in a chaotic financial state. It appeared that without relief a large part of our airline industry was doomed to failure.

The new Act provided economic regulation for the common carrier by aircraft who carried mail or participated in the transportation of passengers or cargo moving in interstate commerce. A new independent agency, the Civil Aeronautics Authority,[3] was created to perform this task and almost all other governmental functions relating to aviation. Air carriers were required to secure certificates of convenience and necessity from the Authority as a condition precedent to operation. Their rates were subject to control, their accounts were required to conform to specified standards, and agreements among them were required to be filed. The Authority was given the power to establish the rates the carriers would be paid for transporting United States mail.

While a number of Federal statutory provisions relating to aviation were left unaffected by the enactment of the Civil Aeronautics Act, that Act was virtually a code of Federal aviation law, made up partially of new legislation, such as the economic regulation just described, and partially of revised and modernized provisions drawn from previous laws. The Act was wholly successful in curing the evils which had impelled its enactment. The years thereafter saw the airlines recover fully from the nearly disastrous financial condition in which they had found themselves. Beyond these direct benefits the Act proved to be an inspiration to the development and progress of aviation for it made known to the industry, the state and local governments, and to the public that the Federal Government recognized the value of aeronautics to this country's commerce, prestige, and security and was determined to provide for the general welfare through its continued development.

Notwithstanding the unquestioned excellence of the present law, its authors did not, in 1938, perform the impossible. The legislative needs of the industry were not fully recognized and met. Consequently, Congress has turned again to the con-

[2] 52 STAT. 973 (1938), 49 U. S. C. (1941) §401 *et seq.*

[3] This agency was transferred to the Department of Commerce by Reorganization Plan No. IV, promulgated pursuant to the provisions of the Reorganization Act of 1939, 53 STAT. 561 (1939), 5 U. S. C. (1941) §133U. In connection with the reorganization, the Authority was divided into two interrelated agencies, the Civil Aeronautics Board and the Civil Aeronautics Administration. In general, the Board is responsible for economic regulation, the issuance of safety regulations and accident investigation, while the Civil Aeronautics Administration is responsible for the administration of safety regulations and the performance of functions relating to air navigation facilities.

sideration of aviation legislation and seeks further to improve the Federal law so that aviation can, without legislative impediments, continue its spectacular development.

No effort will be made here to detail each small amendment to the Civil Aeronautics Act that is required. Most of them are minor clarifications and not of sufficient significance to justify discussion. There are three legislative requirements for an aviation program at this time which are of such overwhelming importance that they justify extended discussion. The relationship between the Federal and State Governments in the regulation of aviation must be clarified. The status under Federal law of contract carriers by air must be made plain. Multiple taxation of air carriers must be avoided.[4]

STATE AND FEDERAL REGULATION

The division of jurisdiction to regulate aeronautics between state and Federal governments has long been discussed and many efforts have been made to settle this question by Federal statute. As early as 1913 legislation was introduced by Senator Penrose and Congressman Vare, under which the regulation of flight everywhere in the air space over the United States would have been the exclusive responsibility of the Federal Government.[5] Thereafter, in the years preceding the enactment of the Air Commerce Act of 1926, there was much discussion in Congress and elsewhere of the wisdom of providing for exclusive regulation of aviation by the Federal Government. As a matter of fact, it appears that in Sections 3(e), 10, and 11(a)(5) of the Air Commerce Act of 1926 the Secretary of Commerce was authorized to adopt and enforce air traffic rules applying throughout the navigable air space. This question arose again when the bills, which later became the Civil Aeronautics Act of 1938, were pending before Congressional committees. It was agreed, in a discussion before the Senate Committee on Interstate Commerce, that in aviation it would be necessary to forget state lines, that it was impossible to have "home rule" in aeronautical regulations. In these discussions the similarity between aviation and radio was mentioned and it was contended that since radio is generally recognized to be a matter of exclusive Federal concern, the regulation of aeronautics should be similarly treated.[6]

In recent years, since the enactment of the Civil Aeronautics Act of 1938, a number of proposals have been made in Congress to strengthen further the Civil Aeronautics Act in this respect. A bill which was introduced in 1943 by Congressman Lea of California, Chairman of the House Interstate and Foreign Commerce Committee, provided for virtually exclusive regulation of aeronautics in all its aspects by

[4] No effort is made here to deal with liability legislation which is of vital significance to air transportation, since that subject is being dealt with elsewhere in this symposium. See Reiber, *Some Aspects of Air Carriers' Liability, supra*, p. 524. Also, no effort is made to discuss legislation necessary to implement international aviation arrangements since the need for, and exact character of, such legislation has not been fully developed. See, in this symposium, Waldo, *Sequels to the Chicago Convention, infra* p. 609.

[5] S. 1295 and H. R. 3916, 63d Cong., 1st Sess. (1913).

[6] *Hearings before Committee on Interstate Commerce on S. 3659*, 75th Cong., 3d Sess. (1938), 10, 11.

the Federal Government.[7] Mr. Lea has subsequently introduced similar legislation, though much more limited in scope, pending at the date of this writing.[8]

In order to understand the need for and the effect of this proposed legislation it is necessary to consider safety regulation of aeronautics separately from economic regulation. Also, the discussion of safety regulation naturally breaks down into that relating to private flying and that relating to the safety regulation of commercial operators.

The above mentioned pending bills would extend Federal jurisdiction to cover all private flying. They also provide that, without the consent of Congress, no state regulation may be imposed upon private flying which hinders, burdens, or interferes with the conduct of interstate air navigation or which impairs the uniformity under which such air navigation is conducted. These bills also give the consent of Congress to the enforcement of Federal private flying regulations by state agencies and state courts.

Thus, they provide for the establishment of uniformity of regulation throughout the United States by extending the jurisdiction of the Civil Aeronautics Board to all flying, and at the same time permits the states to deal with private flying matters of purely local concern without hindrance from the Federal Government.

In addition, the bills would lay the groundwork for a development which is very badly needed. It is essential that flying rules be uniform throughout the United States, but it is also essential that those rules be enforced. If that is to be accomplished it seems clear that the great enforcement agencies of the states must be called in to aid the Federal Government in this effort.[9] It is interesting to note that in 1926 the House Interstate and Foreign Commerce Committee recommended to the House, and the House adopted, a bill which was drawn on this same theory.[10] The Federal Government was to make uniform flying rules for the entire country but give consent to the enforcement of these rules by the states. The provision for uniform flying rules was preserved in the final act but the enforcement section was dropped out in conference.

Actually, by extending the jurisdiction of the Federal Government to regulate private flying from a safety standpoint at any place within the United States, the bill merely constitutes a clarification of existing law. The Federal authorities may now impose this type of regulation not only upon interstate and foreign aviation but also any flying on a civil airway and any flying which directly affects or may endanger safety in interstate or foreign air commerce.

[7] H. R. 1012, 78th Cong., 1st Sess. (1943). [8] H. R. 674, H. R. 3383, 79th Cong., 1st Sess. (1945).

[9] The extent to which State officers and State courts can participate in the enforcement of Federal statutes is a subject sufficiently difficult and significant to merit very extensive treatment. It may be said here that the State and Federal enforcement agencies could cooperate very effectively in the enforcement of Federal aviation laws and regulations with very little, if any, additional State law. See, in this connection, Claflin v. Houseman, 93 U. S. 130 (1876); Miller v. Municipal Court of the City of Los Angeles, 22 Cal. (2d) 818, 142 P. (2d) 297 (1943); Indiana *ex rel.* United States v. Killigrew, 117 F. (2d) 863 (C. C. A. 7th, 1941). These decisions contain an excellent review of the decided cases on this subject.

[10] S. 41, 69th Cong., 2d Sess. (1926) as passed by the House of Representatives April 12, 1926.

The constitutionality of the Federal regulation of intrastate flying on a civil airway, as provided for in the Civil Aeronautics Act, was recently upheld in the *Rosenhan* case.[11] The validity of Federal regulation of intrastate operation *off a civil airway* received judicial approval in the *Drumm* case,[12] which arose as follows: Acting under the provision which grants the Civil Aeronautics Board power to regulate flying which "directly affects or may endanger safety in" interstate or foreign air commerce, the Board, shortly before the war began, promulgated a regulation which required all pilots and aircraft flying anywhere within the United States to have Federal safety certificates. Prior to that time this requirement had been limited to operations on the civil airways, or in interstate or foreign commerce. In issuing this regulation the Board found that any flying within the United States directly affected, and might endanger, safety in interstate or foreign air commerce.

The Board's power to adopt and enforce this regulation was challenged in the Federal District Court of Nevada in the *Drumm* case. In that case the defendant pilot had operated an aircraft without a Federal certificate while he himself had no Federal certificate, but had stayed away from the civil airways and had not operated commercially across state lines. Consequently, the question was raised directly as to whether the Federal authorities could control intrastate flying off the civil airways. On May 1, 1944, a decision was handed down in this case by District Judge Frank H. Norcross, fully sustaining the findings of the Board and the regulations issued in accordance with these findings. Thus, the power of the Federal authorities to regulate flying anywhere in the United States, whether intrastate or interstate or on or off the civil airways, has received judicial approval. Consequently, the proposal made in H. R. 674 and H. R. 3383, insofar as it affects private flying, constitutes nothing more than a clarification of existing law, having as its purpose the elimination of further litigation.

Now as to the proposals contained in this legislation with respect to the safety regulation of commercial operators: H. R. 3383 proposes that all air carriers shall be regulated exclusively by the Federal Government and prohibits the imposition of safety regulations upon such carriers by the states without the consent of Congress. From this requirement are excepted those commercial operators who operate wholly within a metropolitan area and those who do not carry any interstate traffic.

This proposed legislation relies for its validity upon the responsibility of Congress to regulate interstate and foreign commerce and to protect it from burdensome state legislation and to promote the free flow of such commerce throughout this country and the world. Consequently, Congress must pass upon two issues: First, whether the enactment of such legislation is required as a matter of public policy, and, second, whether, upon the basis of all the facts, it is necessary to take such action in order to discharge this responsibility to protect interstate and foreign commerce. These two questions actually merge and become one, for an affirmative

[11] Rosenhan v. United States, 131 F. (2d) 932 (C. C. A. 10th, 1943), *cert. den.*, 318 U. S. 790 (1944).

[12] United States v. Drumm, 50 F. Supp. 451 (D. Nev. 1943).

answer to either of them requires an affirmative answer to the other. Congress has wide discretion in determining what measures are necessary in order to solve problems affecting interstate and foreign commerce. Thus, the factual situation relating to the regulation of aviation and the possible significance of state regulation must be examined to determine whether sound public policy requires the enactment of H. R. 3383 or similar legislation.

We are necessarily led to inquire as to the extent of Federal regulation of aviation under present law.[13] This is best illustrated by considering the regulations applicable to air carriers. All of their airplanes must have certificates of airworthiness issued by the Federal Government. Before this is done, engineers and test pilots for the Government have been over the drawings for the airplane, they have tested the material and various components of the airplane in order to make sure that it is strong enough. They have flight-tested the airplane for airworthiness. Then when the air carrier acquires the airplane it must be presented to an air carrier inspector, who must approve that specific airplane for use on the particular route proposed. After this is done the carrier is required to maintain the airplane in accordance with the most strict and detailed regulations. He is told the number of hours he can operate the engines between overhauls. He is told when particular parts must be changed. He is told when these engines must have periodic checks, and the character of these checks. The carrier is told when he must overhaul the airplane, and when each component of the airplane must be renewed. Maintenance facilities must be approved by the Government before the carrier can operate.

The same things said about the original certification and maintenance of the airplane and engines are equally true of instruments, radio, and propellers. If a mechanical failure or mishap of any kind occurs, the carrier must quickly report it to the Government. And lastly, if any question arises as to the safety of airline equipment, it can be grounded by order of the Government upon a moment's notice. The operation of the entire airline can be stopped with the snap of a finger.

Now as to other airline personnel: All first pilots must hold airline transport pilot certificates, which can be secured only after the most gruelling of physical examinations and written and flight tests. The same is true of co-pilots, except that they may act as co-pilot although holding only a commercial pilot certificate with an instrument rating, the qualifications for which are almost as strict as those for the airline pilot certificate. Even this does not actually qualify them to fly the airline. They must be checked and approved by a Government inspector, and they must fly many familiarization runs over their routes before they are permitted to fly them

[13] "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government." Concurring opinion of Mr. Justice Jackson in Northwest Airlines v. Minnesota, 322 U. S. 292, 330 (1944).

with passengers. Then when they are qualified they are constantly subject to check by air carrier inspectors, and must have periodic flight and physical examinations. Dispatchers must go through much the same process in order to serve in that capacity, and they also must be individually approved for their particular segment of the route. A large part of the maintenance personnel of an airline must pass rigid examinations and obtain certificates.

The equipment to be carried on the airplane is very carefully prescribed, and if any required item of equipment fails, the airplane must be landed at the first available place, and cannot go forward until that equipment is repaired. Methods of operation are prescribed in great detail. Traffic control procedures designed to permit the Government air traffic control operator to know where airplanes are at all times must be complied with, and in coming into airports under instrument conditions carefully defined let-down procedures must be followed.

Airports are examined by air carrier inspectors and the airline can be ordered to stop using an airport at a moment's notice. Weather minimums are carefully prescribed for each airport as are the gross weights at which airline airplanes can land and take off.

So much for airline safety.

Economic regulation is almost equally detailed. Before an airline can start an operation it must prove the necessity for the operation to the Civil Aeronautics Board and convince the Board that it is fit, willing, and able to perform the service. Tariffs must be filed, including the rates and regulations applicable to airline service, and these rates and regulations are subject to the constant supervision of the Board. An air carrier's accounts are prescribed by the Board, and its books are audited periodically to make sure that the prescribed accounting system is complied with. Almost all contracts entered into among carriers must be filed with, and approved by, the Board. Any interlocking directorate in which an airline is involved must be approved by the Board, and any consolidations, mergers, or acquisitions of control affecting airlines must likewise be approved. The Board has power to prevent unfair competitive practices, and generally to inquire into the management of any airline. The Board may at any time demand and secure special reports from air carriers, and does require regularly the submission of monthly and annual financial and operating reports. Airline operations are generally subject to the prescribed economic regulations of the Board.

The safety and economic regulation which has just been sketched briefly is not objectionable. It has been generally good for the industry. However, there appears to be no need for further regulation by the states. No good, and much harm, can result to the air transport industry from piling duplicating and conflicting state regulation on top of that prescribed by Federal law.

It is sometimes urged that before Congress would be justified in assuming complete jurisdiction over the regulation of aviation there should be some indication that duplicating and conflicting state regulation would result from failure of Congress

so to act.[14] No proof should be required that regulations promulgated by forty-eight independent state agencies would lack uniformity and would conflict not only with Federal regulations but also those of other states. If regulation were undertaken by the states, presumably every effort would be made by them to maintain the desired uniformity. However, it seems clear that it would be literally impossible for them to do so for there is no machinery through which each detailed regulatory action could be coordinated. Even if there were, such machinery would necessarily be so cumbersome as to prevent the speedy action required in the regulation of so dynamic an industry as aviation. It is not necessary, however, to speculate as to whether state regulation would be uniform as between states and with the Federal Government, for the past two years have seen demonstrations of what might occur if state regulation of aviation is generally accepted.

In the spring of last year the Public Utilities Commission of Colorado proposed a set of regulations for imposition upon air carriers operating within that state. They filled forty-three single-spaced typewritten pages, and they covered both the operation of interstate and intrastate operators in the greatest of detail.[15] They prescribed that ash containers should be installed in passenger cabins and pilot cockpits, and they required that all pilots carry flashlights with them.

The Public Utilities Commission proposed to designate the route over which an air carrier should fly through the State of Colorado. Since the Federal Government does that also, the regulation raised a substantial question as to what would occur if the conclusion of the Federal authorities and the state authorities should differ in this instance.

The Public Utilities Commission was to determine whether or not the air carriers' aircraft were safe. The Federal Government does that also, thus presenting another possibility of conflict.

The Public Utilities Commission would determine whether the members of the crew of the aircraft were competent to perform their duty. The Federal Government does that also, and a disagreement between Federal and state authorities in this instance would make impracticable airline operation into and out of the State of Colorado. The Commission also reserved the right to determine the number of crew members to be employed in carrying intrastate traffic. The Federal Government now prescribes that air carrier aircraft shall have a pilot and co-pilot. If Colorado determined that to this crew should be added a radio operator and a flight engineer, aircraft operating into Colorado would have to be specially designed in order to provide space for this additional personnel.

The Public Utilities Commission was to prescribe the equipment which must be carried on air carrier aircraft. Here is a very broad field for conflict of jurisdiction

[14] *Hearings before Committee on Interstate and Foreign Commerce on H. R. 1012*, 78th Cong., 1st Sess. (1943) Supp. Vol., p. 91. (Testimony of John E. Benton, General Solicitor, National Association of Railroad and Utilities Commissioners.)

[15] These regulations were discussed in detail by the Hon. A. L. Bulwinkle, member of Congress from North Carolina, in a speech before the House of Representatives. 90 CONG. REC., May 23, 1944, at A2702.

between the Federal and state governments, for the Federal regulations are extremely detailed and specific on this subject.

Another direct conflict between state and Federal regulations appearing upon the face of the proposed Colorado regulations was that which would have required the pilot to take up the tickets of passengers. If this regulation were enforced with respect to air transportation, the pilot on a flight carrying intrastate passengers would be required to be in two places at once, for the Federal regulations require the pilot to be checking his controls, his weather, and the traffic situation when the passengers are getting on board.

These are a few of the difficulties with which the interstate air carrier would have been faced in attempting to operate under the Colorado regulations, and Colorado is just one state. One of the major airlines operates through twenty-three states. As can be readily seen, the imposition of this type of regulation by each one of those twenty-three states would have made the continued operation of this airline impossible, or at least so expensive that the benefits of air transportation would have been denied to all but a wealthy few. The regulations proposed by the Colorado Commission have not been issued in their final form. However, they serve as an example of what may happen to the air transport industry unless protective legislation is passed.

Now, as to economic regulation. H. R. 3383 would provide exclusive economic regulation of air carriers by the Federal Government, and would prohibit the establishment of such regulations by the states without the consent of Congress. Here again, operators who engage in business solely within metropolitan areas, and operators who do not participate in interstate traffic, would not be covered and would be subject to such regulation as the state saw fit to impose upon them.

The impossibility of effecting uniformity in economic regulation has also been recently demonstrated. The National Association of Railroad and Utility Commissioners is sponsoring in State Legislatures a so-called uniform bill, providing for economic regulation of air carriers operating within a state. It does not limit its regulation to the purely intrastate operator. It also applies to the interstate carrier if that carrier transports intrastate traffic within the state. The interstate carrier would have to secure a state certificate to carry intrastate traffic. Its intrastate rates would be subject to control by the state public utilities commission, and even its interstate rates would be subject to investigation by the commission. It would be subject to suit before the state commission for reparations. It would have to file tariffs containing its intrastate rates and time tables showing its schedules.

It could be forced to extend its lines within the state, and could not abandon an operation without approval of the commission. It would have to file surety bonds to guarantee payment of liabilities, and the commission could force it to establish through service and joint rates with other air carriers. It would have to keep an accounting system prescribed by the state commission, and make such reports to the commission as the commission required. The state commission would have even

more control over service than the Civil Aeronautics Board. If the commission decided that the airline was not operating enough aircraft or enough schedules between two points, the airline could be ordered to put on more service. It could be ordered to add stops, and to change its schedules, and could be "called on the carpet" by the commission for failing to maintain schedules in a way the commission thought proper.

It should take no argument to demonstrate that this type of regulation could not be kept uniform throughout the twenty-five or thirty states through which a particular airline might be operating,[16] but even if it were possible to maintain the uniformity of these regulations the burden of complying with the same regulations twenty-five or thirty times would be staggering to the interstate air carrier. Certainly the Constitution does not deny the Congress the right to protect interstate commerce against a threat of this magnitude, while at the same time imposing upon Congress the responsibility for looking after the welfare of persons engaged in such commerce. But more than this, if state regulatory action cannot be guided by Congress in this instance, it would be quite impossible for Congress to insure the execution of the policies relating to interstate and foreign commerce which it clearly has the power to adopt.

The proposal to give the states power to deny to the interstate carrier the right of carrying intrastate traffic is directly contrary to the principle upon which the Civil Aeronautics Act of 1938 was enacted. That Act states in Section 2 that Congress regards it as being in the public interest that there be developed an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the postal service, and of the national defense. In Section 2 Congress also declares to be in the public interest the regulation of air transportation in such manner as to foster sound economic conditions in such transportation. The Civil Aeronautics Board was directed to carry out these policies, but if the states are permitted to grant or deny the right of the interstate carrier to carry intrastate traffic, the Board will not be able to carry these policies into effect. The Board has always endeavored to grant certificates only when the new service was economically justified, and when it provided a proper segment of the national air transport system. The presence or absence of available intrastate traffic has an important bearing upon whether or not a particular route is economically justified, and if the Board cannot be sure that the carrier will have the right to carry intrastate traffic it can never be certain whether or not it is carrying out the policy of Congress. If the route is authorized and the right to carry intrastate traffic is denied, the expense of carrying these empty seats will have an important effect upon the entire

[16] During the first six months of 1945, 44 State legislatures met in regular session and the Railroad Commissioners' proposed uniform bill, and bills similar to that proposed by the Railroad Commissioners were introduced in twenty-four of them. Even upon introduction in the legislature very few of these bills were exactly like that proposed by the Commissioners, thus indicating the impossibility of securing uniformity even in the terms of the law itself without regard to its adminstration. These bills passed in only three of the States and in those three interstate air carriers were excepted from the operation of the legislation.

system of the interstate carrier. With these possibilities in mind, it certainly cannot be argued that by participating in this type of regulation the states are regulating a purely local matter. Their regulations will have a sweeping national effect.[17]

The same thing can be said of the rate regulation proposed in the Railroad Commissioners' bill. As has been pointed out, the largest of the domestic air carriers operates in twenty-three states. If the bill is adopted generally it would be necessary that this airline file tariffs in twenty-three states, that it participate in reparation cases and in rate proceedings in each one of those states, and that in addition to the rate proceedings related to intrastate rates, it would also be required to participate in investigations of its interstate rates. The mere administrative cost of submitting to such regulation would be enormous. But quite aside from the administrative expense of filing all of this material and participating in all of these proceedings, the Civil Aeronautics Board certainly could not be held responsible for the continued economic soundness of the air carrier if all of its intrastate rates were subject to adjustment by a large number of state commissions with entirely different ideas as to what the proper principles of rate-making might be. Even if it be assumed that the Civil Aeronautics Board might have jurisdiction to correct discriminations arising from intrastate rates fixed by a state, the administrative litigation involved would be overpowering.

These two forms of state regulation are the best examples of interference with Federal policy, but other matters covered in the proposed economic regulatory bill, when taken in the aggregate, loom just as large. The power in the state commission to require the carrier to extend service, and its power to refuse permission for abandonment, can have important effects upon the entire airline system, as can the power to require the establishment of through service and joint rates. The power of the state commissions to prescribe airline accounts contains obvious possibilities of conflict. While the bill attempts to answer this in advance by requiring as much uniformity as possible between the state and Federal accounting systems, it is certainly unlikely that twenty-three groups of men, acting independently, could approach uniformity even under this requirement. The monthly and annual financial and operating reports which must be filed with the Civil Aeronautics Board are regarded by some as unduly burdensome. If they are multiplied twenty-three times, the full time of many employees will be devoted to the preparation of reports. Moreover, if the states were to adopt the Federal reporting requirements, and the Board should determine to alleviate their severity, it would be necessary to go from state to state, urging the state commissions to follow the Board's example.

The service regulation proposed in the new bill has already been discussed.

It seems clear that the net effect of all these requirements in each state through which an airline operates would be to deprive Congress of all power to foster and

[17] This consideration, as well as others referred to in this article, has been emphasized by Mr. Oswald Ryan, member of the Civil Aeronautics Board. See Ryan, *Economic Regulation of Air Commerce by the States* (1945) 31 VA. L. REV. 479, 522.

supervise the development of air transportation in this country, and turn that responsibility over to forty-eight state commissions.

So much for the factual justification of H. R. 3383. The constitutional validity of the legislation now comes into question. The Congress by this legislation would be asserting the right to regulate the intrastate business of the interstate air carrier and it has been argued that this would constitute an invasion of the states' power to regulate their internal commerce.[18] The validity of the legislation can be sustained on a number of grounds. Reference need only be made to those decisions of the Supreme Court relating to Congress' control over the navigable waters to find support for the legislation. In this field the plenary power of Congress has long been recognized even though the Constitution does not specifically state that all commerce on the navigable waters is subject to the jurisdiction of Congress. The basis for the complete Congressional power is found in the commerce clause and arises because such waters "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted. . . ."[19] The power of Congress with respect to the navigable waters was further explained and amplified in the *Appalachian Power* case.[20] No distinction can be found between the navigable air space and the navigable waters for the air space is equally susceptible of use as a highway for commerce. This concept was particularly well stated in the concurring opinion of Mr. Justice Jackson in the *Northwest Airlines* case:

> "Students of our legal evolution know how this court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. *Gibbons* v. *Ogden*, 9 Wheat. 1, to *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."[21]

Even without reference to the analogy between the navigable air space and the navigable waters, Congressional regulation of intrastate air commerce is fully sustained by the long established constitutional doctrine that Congress may regulate intrastate commerce if it is necessary as a practical matter in order to protect or promote interstate commerce. This concept is exemplified in the *Southern Railway* decision.[22] There the court held that Congress could regulate the use of safety appliances on railroad cars moving wholly intrastate. This conclusion was reached on the theory that since intrastate cars and interstate cars would move over the same tracks the regulation of the former was essential in order to carry out the purpose of the statute insofar as it related to interstate operations. This concept of Congressional power also affected the decision in the *Rosenham* case, wherein the court

[18] *Hearings, supra* note 14, at 67 (testimony of Mr. Benton).

[19] The Daniel Ball, 10 Wall. (U. S.) 557, 563 (1870).

[20] *See* United States v. Appalachian Power Co., 311 U. S. 377, 404 ff. (1940).

[21] Northwest Airlines v. Minnesota, 322 U. S. 292, 303 (1944).

[22] Southern Railway Co. v. United States, 222 U. S. 20 (1911).

upheld that provision of the Civil Aeronautics Act of 1938 which authorizes Federal regulation of intrastate aircraft operations if they are on a Federal civil airway and stated:

"The appellant contends that on a trial of the case he could have shown that the flight of his aircraft in the designated civil airway did not in any way endanger or interfere with safety in interstate commerce. We may concede that he could have shown that at the time the aircraft in question was in flight through, or upon, the designated airway no other aircraft was within dangerous range, but he cannot avoid the incidence of the Act by showing that these particular flights did not actually endanger interstate commerce. Congress has not seen fit to limit the question of safety in these circumstances to a manifestation of actual danger, rather it has sought to eliminate all potential elements of danger. . . . We conclude that such statutory precautions do not transcend the powers granted to the Congress over interstate commerce, or unduly encroach upon the powers reserved to the sovereign states."[23]

The facts involved in these decisions bear primarily upon safety regulation and it might be argued that while exclusive Federal safety regulation would be valid, exclusive economic regulation of air transportation would not. There is no validity in this argument for, as has been fully demonstrated by the factual statement made previously in this discussion, enormous burdens could be imposed upon interstate air carriers by proposed state economic regulation and the Congressional policy governing the development and regulation of air transportation could be completely thwarted. The Supreme Court has recently passed upon a situation similar in principle to the one under discussion here and has upheld the exercise of Federal power. Wickard v. Filburn[24] involved the constitutional validity of the quota provisions of the Agricultural Adjustment Act applicable to the growing of wheat. The court held that under the commerce clause, Congress may restrict the right of a farmer to grow wheat even for his own consumption on his own farm, and stated in explanation of this conclusion that:

". . . this record leaves us no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect of defeating and obstructing its purpose to stimulate trade through increased prices."[25]

Thus, the *Filburn* case leaves no question but that Congress is not only empowered to establish policies with respect to the development and regulation of interstate air transportation but is also given such additional powers as necessary to make certain that these policies can be fully executed.

The preceding discussion justifies the conclusion that Congress may assume full power to regulate aviation even though in some instances it may be intrastate in character. The pending H. R. 3383 goes further than this, however, and states specifically in Section 7(b) that the states shall not regulate air carriers or impose regulation upon other branches of aviation which would hinder, burden, or obstruct interstate or foreign air commerce. This provision, though rather unique in state-

[23] *Supra* note 11, at 935. [24] 317 U. S. 111 (1942). [25] *Id.* at 128, 129.

ment, embodies an old and well-established constitutional concept. It has long been recognized that state regulation of persons engaged in interstate commerce may be so burdensome as to render the state statute involved unconstitutional. In these instances the Supreme Court has struck down the statute. However, it has always been necessary for the court to explore very carefully the factual situation concerning the application of the state statute and to determine whether or not it was intended by Congress that the Federal statute and the state statute governing the same subject matter should co-exist. The necessity for the searching inquiry and long debate preceding the reaching of conclusions in these cases has impelled the court to suggest that if Congress wishes to establish exclusive jurisdiction over a particular subject matter and to invalidate pre-existing state laws with respect to that subject matter, Congress should make its intention absolutely clear by saying so. This was well expressed in a recent case by Mr. Justice Frankfurter:

"To require the various agencies of the Government who are the effective authors of legislation like that now before us to express clearly and explicitly their purpose in dislodging constitutional powers of states—if such is their purpose—makes for care in draftsmanship and for responsibility in legislation. To hold, as do the majority, that paralysis of state power is somehow to be found in the vague implications of the Federal-renovated butter enactments, is to encourage slipshodness in draftsmanship and irresponsibility in legislation."[26]

Section 7(b) of H. R. 3383 is an effective response to this suggestion that if exclusive regulation is deemed necessary Congress should leave no doubt as to its desire in this respect. Considered as such, and in light of all the facts and circumstances relating to the impact of state regulation upon aviation, there can be little question of the validity of that section of the proposed act.[27]

In conclusion on this point, the case for exclusive Federal regulation of air commerce can be briefly stated. Due to the speed and mobility of aircraft and the delicacy of the instrumentality itself, the establishment of exclusive Federal regulation is the only means by which the further unhampered development of aviation can be insured. For reasons already stated, uniformity of regulation cannot be expected if agencies of all the forty-eight states plus the Federal Government may participate in regulation. Even if uniformity in regulation could be expected, the duplication of requirements resulting from the efforts of these forty-nine agencies would constitute a burden so intolerable as to smother aviation progress. The policies of Congress with respect to the development and regulation of this industry would be completely thwarted if it were also subjected to this duplicating and conflicting state regulation. These being the circumstances facing Congress, the con-

[26] *See* Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 178 (1942).

[27] The assumption by Congress of exclusive jurisdiction to regulate aviation can be justified by reference to powers other than that relating to interstate and foreign commerce. The postal power and that relating to national defense can be relied upon and in view of the broad international aspects of aviation the treaty making power will also have its effect. The significance of recent developments in international aviation and its regulation is ably discussed in Seago and Furman, *Internal Consequences of International Air Regulations* (1945) 12 U. OF CHI. L. REV. 333.

stitutional power of that body to take the action necessary to avoid these results to an essentially interstate enterprise cannot be questioned.

ECONOMIC REGULATION OF CONTRACT CARRIERS

H. R. 674 provides economic regulation for *contract* carriers by air. The economic regulation contained in the Civil Aeronautics Act of 1938, previously described, applies only to *common* carriers, thus leaving unregulated an activity in air commerce which bids fair to become a substantial competitive factor in the industry. Space does not permit a full review of the development of the contract motor carrier and the effect of that type of operation upon the common carrier. It is only necessary to point out that in preparing the Motor Carrier Act of 1935[28] the Congress considered it necessary to regulate both of these types of operation. This was done because of evidence before the Congress at that time which indicated that the contract carrier whose obligations to the public were very limited could skim the cream from the available traffic, thus depriving the common carrier trucker of substantial revenues. It was also considered unfair to bring the common carrier under strict regulation while leaving a strong and dangerous competitor free from regulation. The regulatory provisions of the Motor Carrier Act of 1935 as they apply to contract carriers were obviously motivated by a desire on the part of Congress to provide contract carrier service where it is most useful but at the same time to protect the common carrier system from disruption by unregulated contract truckers. There seems to be no question but that the welfare of the common carrier system was regarded as a paramount consideration from the standpoint of public interest because of the extensive public responsibilities which are imposed upon such carriers.

Up to this time aircraft have been most useful in the carriage of passengers. The cargo business has not been of great significance. Consequently, contract carriage by air has not developed substantially for contract carriage finds its greatest usefulness in the transportation of cargo. A new era is dawning in aviation, however. Thousands of pilots and other aeronautical personnel are being released from the Army and thousands of transport aircraft of proven types are being sold or leased by the Federal Government under favorable financial arrangements. Moreover, the war has demonstrated the utility of the aircraft in the carriage of freight. All these things have resulted in an upsurge of interest in contract carriage by air and this interest is being manifested in the establishment of very substantial contract operations within the country. Unless cognizance is taken of this development by the Congress within a short time, it can be expected that the highway carrier experience will be repeated and our well-established common carrier industry will be severely damaged before appropriate regulation is provided for.

The provisions of H. R. 674 dealing with the regulation of contract carriers are closely akin to those contained in the Motor Carrier part of the Interstate Commerce Act. They place the regulation of these carriers under the Civil Aeronautics Board,

[28] 49 STAT. 543 (1935), 54 STAT. 919 (1940), 49 U. S. C. (1941) §302 *et seq.*

as are the air carriers. They provide that the inauguration of contract carrier operations must be preceded by the issuance of a license by the Civil Aeronautics Board and the Board is required to issue such a license upon application if the applicant is fit, willing, and able to perform the service proposed and this service is required by the public interest. Air contractors are required to file tariffs with the Board and to adhere to them. Rebating is prohibited and no change in a tariff may be made except upon specified notice. Air contractors are required to establish reasonable minimum rates for their service and to maintain specified minimum wages and maximum hours for the pilots and co-pilots, to maintain their accounts under Board regulation, to file agreements, and to adhere generally to the economic regulations specified by the Board. It should be emphasized that the rate regulation provided for under H. R. 674 for air contractors is limited to minimum rates. Thus, while an air contractor may charge more than the rate specified, he is forbidden to charge less. The Board is given substantial latitude in exempting air contractors or classes of air contractors, totally or partially, from the economic regulation provided for, thus permitting a gradual application of the regulatory provisions proposed.

The theory of this proposed legislation is clearly based upon a desire to permit the sound growth of both contract and common carriers in the air transportation business—to permit them to exist side by side, each providing the public service for which each is best fitted. It is designed to prevent a repetition of the highway carrier experience by placing in the hands of the regulatory agency the power to determine whether a part of the common carrier system would be damaged by the inauguration of contract carriage and to determine whether, on the basis of all the facts, the public interest in the additional service would be sufficient to justify that damage. The bill would eliminate the unfairness, under existing law, which outlaws certain competitive practices for common carriers but permits contract carriers to engage in them.

It has been alleged that the bill goes too far—that the necessary purposes of the bill could be accomplished by statutory provisions far less stringent and by covering a narrower scope of contract operations. It is stated that because of this overregulation many types of commercial aircraft operation of a character beneficial to the public would have to be discontinued. It is possible that this is true and this argument should be carefully weighed by the Congress in finally enacting contract carrier regulation. Nevertheless, it seems clear that Congress should move promptly in enacting such provisions as do appear necessary to protect the common carrier industry from unfair competition and to avoid the much more difficult legislative task which will come later if action is not taken now.

MULTIPLE TAXATION OF AIR CARRIERS[28a]

On June 12, 1945, H. R. 3446 was introduced in Congress. It was entitled "A Bill to Provide for the Avoidance of Multiple Taxation of Air Commerce, and for

[28a] For a discussion of problems included in seeking to eliminate multiple taxation of aviation, see Welch, *The Taxation of Air Carriers, infra* this symposium, p. 584.

Other Purposes." In order properly to understand the result sought to be achieved by the bill, and the means devised for that achievement, it is necessary to consider briefly the background of the bill.

In the *Northwest Airlines* case,[29] the Supreme Court upheld a property tax assessment by Ramsey County, Minnesota, on the entire fleet of aircraft owned by Northwest Airlines, despite the fact that portions of that fleet were subjected to property taxes in other states in which Northwest operated, specifically Oregon, Washington, Montana, North Dakota and Illinois. With regard to the *Northwest* decision, the Hon. Alfred L. Bulwinkle, Member of Congress from North Carolina, stated as follows:

"That decision foreshadowed possible chaos in the state taxation of air carriers. Destructive multiple taxation became a possibility, and inequity in the sharing of air carrier taxes among the states was virtually certain to follow."[30]

Principally as a result of the *Northwest* decision Congress passed an Act directing the Civil Aeronautics Board to consult with the appropriate authorities of the several states, Territories and possessions, and subdivisions thereof, with a view to developing means for eliminating and avoiding multiple taxation of persons engaged in air commerce and their employees, by those jurisdictions, and other taxation, by those jurisdictions, which has the effect of unduly burdening or unduly impeding the development of air commerce.[31] The Board was directed to report to the Congress the results of its consultations, and such recommendations as it might deem advisable, including recommendations for legislation by the Congress if such legislation appears necessary or appropriate.

The Board's report[32] was transmitted to Congress under date of April 3, 1945. It contains such a wealth of data and is such a comprehensive analysis of the problem, that space permits a statement here of only its most salient points.

The Board concludes that the term "multiple taxation" is properly applied to taxation which arises from the territorial overlapping of jurisdiction to tax, and that state or local taxes on, or measured by, personal property, net income, capital stock or gross receipts, state or local taxes on aviation fuel, and state pilot license fees, are presently or potentially productive of multiple taxation. The Report states in part as follows: [33]

"For the purpose of this study, . . . the term 'multiple taxation' is restricted to taxation which arises from the territorial overlapping of jurisdiction to tax. The multiplicity arises from differences among state tax laws and administrative interpretations as to the part of the property, net income, capital stock, or gross receipts of a business that is properly regarded as within the taxing jurisdiction of the state. By indirection, multiple taxation may be defined as the type of taxation that would be eliminated (1) if business transactions and operations were confined to a single taxing jurisdiction—for practical pur-

[29] *Supra* note 21. [30] 91 Cong. Rec., June 12, 1945, at A3043.
[31] Pub. L. No. 416, July 3, 1944, 58 STAT. 723.
[32] C. A. B., MULTIPLE TAXATION OF AIR COMMERCE, H. R. Doc. No. 141, 79th Cong., 1st Sess. (1945).
[33] *Id.* at 27 *et seq.*

poses, if they were exclusively intrastate, (2) if the only taxes on business were levied by the Federal Government, or, (3) if the states uniformly applied identical rules for determining taxable situs.

"The *Northwest Airlines* case provides an excellent example of the nature of multiple taxation. . . . , while Minnesota was taxing the entire fleet of planes, the states of Oregon, Washington, Montana, North Dakota and Illinois adopted the theory that portions of the fleet had taxable situs within their boundaries on an allocation basis. Thus, the difference in situs theories led to multiple taxation."

It will be noted the Act above referred to[34] was directed at taxation which has the effect of unduly burdening air commerce, as well as multiple taxation of such commerce. The Board concluded that state taxes on aviation fuel are unduly burdensome, as well as potentially multiple, taxes. The report states in part:[35]

"Fuel taxes, the third important component of the airline's tax payments, qualify as being unduly burdensome and as potentially impeding normal-air carrier development.

". . . Only an historical accident has resulted in the imposition of tax on the air carriers' source of power. If they had been able to use coal, kerosene, fuel oil, or some other means for the propulsion of their equipment, doubtless the question of fuel taxation would never have arisen. Although the fuel tax imposed by the Federal Government might properly be regarded as a user tax to defray the cost of constructing and maintaining such special facilities as the airways, there is little that can be said for state fuel taxes in this respect."

The report concludes: "The case against the continuance of state taxes on aviation fuel used by interstate carriers is conclusive."[36]

After formulating the above conclusions regarding state and local taxation which is, or may become, multiple or unduly burdensome taxation, the Board's report concludes further that the problems arising from such taxation:

". . . are not self-correcting, that the courts are not in a position to eliminate burdens upon interstate commerce arising out of conflicting state tax policies, and that only the Congress is properly equipped to solve the problem."[37]

The solution recommended by the Board is the enactment of a Federal statute which would provide for the allocation among the several states, in accordance with prescribed formulae, of the bases for taxes on, or measured by, property, net income, capital stock, and gross receipts. Also recommended is that provision be made for a Federal agency to interpret and administer the prescribed allocation formulae, assisted in this function by an advisory committee of five members appointed from a panel of state and local tax officials and experts.

The Board recommends also that the proposed statute expressly forbid the imposition by the states of state pilot license fees on pilots engaged in interstate or foreign air commerce. While, as indicated above, the Board recognizes that state taxes on aviation fuel are discriminatory and burdensome, it takes the position that the solution of that problem involves consideration of the general fiscal relationships

[34] *Supra* note 31.
[35] MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 32, at 35.
[36] *Id.* at 64.
[37] *Id.* at 36.

between the Federal Government and the states, and the Board, therefore, recommends that a separate study be undertaken looking to the formulation of an equitable legislative solution of the problem.

H. R. 3446 is designed to carry into effect the Board's recommendations. That the Congress has the power, under the Commerce Clause of the Constitution, to prevent multiple, and other unduly burdensome, taxation of interstate air commerce, and that only the Congress is, as the Board has concluded, "properly equipped to solve the problem," is quite clear. The *Northwest* decision, which focused national attention on the problem, also demonstrated that the United States Supreme Court had no doubt but that Congress had the authority to solve that problem and that the only practical solution would be a Congressional one. In the principal opinion in the *Northwest* case, Mr. Justice Frankfurter, speaking of the doctrine of tax apportionment which had been applied by the court in cases involving state taxation of vehicles used in interstate land transportation, says:

"To what extent it should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship."[38]

Mr. Justice Black, in his concurring opinion in the *Northwest* case, referring to "The difficulties inherent in the judicial formulation of general rules to meet the national problems arising from state taxation which bears in incidence upon interstate commerce," concludes:

"These problems, it seems to me, call for Congressional investigation, consideration and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution."[39]

The concurring opinion of Mr. Justice Jackson contains the strongest statement of the power of Congress over state taxation of interstate carriers:[40]

"Congress has not extended its protection and control [of aviation] to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform Federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax free altogether. . . .

"It seems more than likely that no solution of the competition among states to tax this transportation agency can be devised by the judicial process without legislative help."

It is likewise clear that the proposed Federal statute preventing multiple and other burdensome taxation of interstate air carriers should be based on the principle of

[38] Northwest Airlines v. Minnesota, 322 U. S. 292, 300 (1944).
[39] *Id.* at 302.
[40] *Id.* at 303-304, 306.

the apportionment of the carrier's property and operations for taxing purposes. This is the concept of taxation embodied in H. R. 3446. The undesirability of an exclusive Federal tax (of the type mentioned by Mr. Justice Jackson in the above quotation) is apparent. Taxation on that basis runs counter to our American doctrine of dual sovereignty, in that the states are totally divested of their residual taxing power. Without a state sharing in the exclusive Federal tax, the states are also divested of revenues, and, if sharing is attempted, the problem of a fair allocation remains to be solved. Equally undesirable would be a statute based on the concept that only one state, for example the state of "commercial domicile" (*viz.*, in which the principal place of business is located), shall have jurisdiction to tax an interstate air carrier. The right of a state to tax net income earned therein by a corporation and that portion of its capital stock representing property in the state, whether or not the corporation was incorporated in that state, has been established by decisions of the Supreme Court and is widely exercised. A limiting of income or capital stock taxes to the state of commercial domicile would, therefore, be a change of major proportions. Moreover, such a limitation would deprive states, other than the domiciliary state, of jurisdiction to tax an air carrier even though they may furnish important governmental services and benefits to that carrier.

H. R. 3446 is in all respects sound in principle, but during its study of this legislation Congress should give consideration to amendments needed to strengthen the bill and simplify its administration. Space does not permit a full discussion of these amendments. Prompt consideration by Congress of this legislation appears to be essential, since the *Northwest* decision had the effect of introducing complications into state taxation, not only for the air carriers but for the state tax administrators as well. If enacted, it would permit air transportation to develop without fear of a crushing burden of multiple state taxation, and would permit state taxing authorities to be sure that each would get its fair share of the total taxes levied against air transportation and not be deprived of needed revenues.

THE TAXATION OF AIR CARRIERS†

RONALD B. WELCH*

The future of air-line taxation was foreshadowed by two events of the year 1939. One of these was the destruction of the Polish army by the Luftwaffe. The second was the inconspicuous act of a Ramsey County official who listed on the Minnesota property tax rolls the whole fleet of Northwest Airlines despite the fact that all members of the fleet made regular excursions beyond the borders of the state and some of them regularly found their way onto the tax rolls of other states. Of the two events, the second had more immediate and more obvious tax implications. But the national concern for a vigorous peace-time aviation industry which was awakened by the war will be largely responsible for the translation of these implications into action and will, in the long run, far overshadow the Northwest Airlines case in its effects upon the taxation of this mode of transportation.

The facts of the *Northwest Airlines* case[1] and the diverse opinions which it elicited from the courts are too well known to bear repeating. We are concerned here with the consequences of the decision that the taxes extended on the Ramsey County assessment were constitutional and of the uncertainty whether the taxes imposed by other states on the same property, if litigated, would be sanctioned or condemned. One of the early effects was a Congressional proposal to prohibit state taxation of air carriers "in a manner, or on a basis, which results or is likely to result in multiple taxation."[2] This ambiguous provision was later supplanted by a proposal that the Civil Aeronautics Board conduct a study of multiple and unduly burdensome taxation of air lines and their employees by states, territories, possessions, and their political subdivisions and report its recommendations to Congress. The latter proposal was enacted[3] shortly after the United States Supreme Court placed

† Opinions expressed in this article do not necessarily reflect the views of the Bureau of Internal Revenue.

* A.B., 1928, Doane College; Ph.D., 1932, Yale University. Tax Economist, Bureau of Internal Revenue. Formerly Director of Tax Research for the Board of Investigation and Research, Research Director for the National Association of Assessing Officers, Research Assistant to the Connecticut Special Tax Commission of 1933, and Instructor in Economics at the University of New Hampshire and Yale University. Member of the Civil Aeronautics Board's Advisory Committee on Multiple Taxation of Air Carriers, 1944-45, and of the National Tax Association's Committee on the Taxation of Transportation, 1945- . Author of numerous articles on taxation.

[1] Northwest Airlines v. Minnesota, 322 U. S. 292 (1944). For opinion of the Supreme Court of Minnesota, see State v. Northwest Airlines, 213 Minn. 395, 7 N. W. (2d) 691 (1942). For critical commentary, see Note (1944) 57 HARV. L. REV. 1097 (Prof. Powell); Welch, *The Northwest Airlines Case* in NATIONAL TAX ASSOCIATION, PROCEEDINGS OF THIRTY-SEVENTH NATIONAL CONFERENCE (1944) 285.

[2] S. 246 and H. R. 1012, 78th Cong., 1st Sess. (1943).

[3] Pub. L. No. 416, 78th Cong., 2d Sess. (July 3, 1944), 58 STAT. 723.

the final stamp of judicial approval upon the Minnesota tax. The Civil Aeronautics Board reported the results of its study to the Congress early in 1945,[4] and its recommendations have been incorporated by Representative Bulwinkle in a bill[5] on which hearings are to be held shortly. Upon the fate of this bill hangs much of the immediate future of state taxation of the scheduled domestic air lines.

PROBLEMS OF MULTIPLE AND UNDULY BURDENSOME TAXATION

The present article is chiefly concerned with the problems raised in the course of the Civil Aeronautics Board's study. Of these the following appear to be most fundamental:

1. Should the air lines be removed from the tax jurisdictions of the states and subjected only to Federal taxation?
2. Should air lines be subjected to specially designed taxes or to the taxes that apply to other carriers or to business concerns generally?
3. Should the states be required to adhere to, or be limited by, uniformly defined tax bases?
4. Should the maximum amount of an air line's "allocable base"—the quantum available for division among the states—be appraised by a Federal agency?
5. Should the several states be required to adhere to, or be limited by, uniform allocation formulas?
6. Should an air line's maximum "allocation factors"—the fractions by which the "allocable base" is divided among the states—be computed by a Federal agency?
7. Should the states be precluded from taxing aviation fuel?

It will be observed that this list of questions includes no inquiry as to the particular formulas that will best divide the "allocable bases" among the several states. This inquiry necessarily absorbed much of the time and energy of the Civil Aeronautics Board and its staff. However, it is regarded here as a question of secondary importance to which a reasonably satisfactory answer can be readily obtained by informed but disinterested parties once agreement is reached on the fifth and sixth questions listed above.

THE PRESENT STATUS OF AIR-LINE TAXATION

A detailed description of contemporary tax institutions as they affect the commercial air lines will not be attempted in this article. In brief, these carriers are subject to substantially the same taxes that apply to other business concerns, or to other transportation companies, except for certain state motor fuel taxes and nominal state aircraft and pilot license fees. Thus the Federal Government derives net income, excess profits, capital stock, old age insurance, and unemployment compensation taxes from air carriers,[6] and indirectly derives gasoline and lubricating oil taxes from

[4] C. A. B., MULTIPLE TAXATION OF AIR COMMERCE, H. R. Doc. No. 141, 79th Cong., 1st Sess. (1945).

[5] H. R. 3446, 79th Cong., 1st Sess., introduced June 12, 1945.

[6] Under the Revenue Act of 1945, the two excess profits taxes and the capital stock tax are repealed as of 1946. A special provision of the INTERNAL REVENUE CODE, §727(h), operated to relieve most of the air-mail carriers of liability for the war excess profits tax.

them as the result of their consumption of commodities on which manufacturer's excise taxes have been collected. The states generally apply their net income, capital stock, and unemployment compensation taxes to air lines in common with other incorporated business enterprises; and property tax laws apply to these carriers either without special adaptation or with provision for state assessment in lieu of the traditional local assessment of this type of tax.[7] A few taxes on gross earnings from intrastate traffic are collected from the air lines, and these may be either of general scope, as in Indiana, Mississippi, and Washington, or of more limited application, as in Kentucky, New York, Pennsylvania, and Tennessee. The only other air-line tax of significant yield is that imposed on aviation fuel in nearly half of the states.

The relative magitude of these several types of taxes varies considerably from year to year and from one carrier to another. For the scheduled domestic air carriers, Federal taxes (including gasoline and lubricating oil taxes accrued by the carriers though paid by others) have exceeded state and local taxes in all years of record, rising to what will probably prove to have been a near-peak of 89.4 per cent of the total in 1943.[8] Net income taxes, most of which are Federal, rose from around 12 per cent of the total in 1938 to 78.6 per cent in 1943.[9] Payroll and fuel taxes have comprised the other two large categories; both have increased steadily in absolute amounts but, because of the faster increase of income taxes, have declined in relative importance as air-line prosperity has risen. State and local taxes on property, net income, capital stock, and gross receipts—the taxes involving or threatening the type of multiple taxation to which Northwest Airlines objected—comprised 2.6 per cent of all air-line taxes in 1943 and were less than 7.5 per cent at the highest point of which we have knowledge.[10]

Not only do state and local taxes comprise a small percentage of total air-line taxes, but air lines account for a small percentage of total state and local government revenues. The 1942 state and local taxes of the scheduled domestic carriers operating in continental United States (excluding payroll taxes allocated to war contract operations) amounted to $1,900,913.[11] This was only 0.015 per cent of total state and local government revenues in that year.[12] Georgia, Tennessee, Utah, and Wyoming were the only states in which these carriers accounted for as much as 0.1 per cent of all government revenues in 1942, and the highest of the percentages in these four states was 0.215 in Wyoming. California, Georgia, Illinois, and Tennessee were the only states which, together with their political subdivisions, collected more than $100,000

[7] State assessment of air lines is now found in Kentucky, Maryland, Minnesota, Nevada, North Dakota, Oregon, Utah, Washington, West Virginia, Wisconsin, and Wyoming. It is associated with central assessment of other public service enterprises in all cases.

[8] MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 15. See also, BD. OF INVESTIGATION AND RESEARCH, CARRIER TAXATION, H. R. Doc. No. 160, 79th Cong., 1st Sess. (1945) 314-316.

[9] CARRIER TAXATION, *supra* note 8, at 314; MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 16.

[10] MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 16.

[11] *Id.* at 75.

[12] BUR. OF THE CENSUS, GOVERNMENTAL FINANCES IN THE UNITED STATES: 1942, U. S. SUMMARY (1945) 14.

from the scheduled domestic air lines as the result of 1942 operations, and only Tennessee collected more than $200,000. It follows from these facts and the moderately ascending trend of the air lines' state and local tax payments that these levels of government, both in the aggregate and individually, have not yet relied upon the taxation of air transportation for a significant part of their fiscal sustenance.

It does not follow that the states are indifferent to air-line taxation. Their interest arises partly from the belief that air transportation will greatly expand within the next few decades. But perhaps of even more importance is the identification of the air-line tax controversy with the whole issue of states' rights. Those who are opposed on general grounds to Federal encroachment upon the taxing powers of the states are concerned with the size of the camel, not the size of the camel's nose.

EXCLUSIVE FEDERAL TAXATION

The simplest and surest method of terminating the multiple and unduly burdensome state taxation to which the Civil Aeronautics Board's attention was directed is to terminate state taxation. This possibility was mentioned in the *Northwest Airlines* case by Mr. Justice Jackson when he observed that the Federal Government might, if it chose, "exact a single uniform Federal tax on the property or the business [of the air lines] to the exclusion of taxation by the states."[13] Any such program, it may be assumed, would be associated with special Federal excise taxes, the proceeds of which would be distributed among the states. But even with this seasoning it would be distinctly unpalatable to the states, and, constitutional questions aside,[14] may fairly be regarded as visionary within the present political environment. Undoubtedly, then, the air lines will continue to be taxed under both Federal and state laws, and the solution of the problem of multiple taxation must be sought in limitation rather than prohibition of state taxation.

DIFFERENTIAL TAXATION

The leading precedent for Federal limitation of state taxing powers is found in Section 5219 of the U. S. Revised Statutes. This section authorizes the states to impose a limited number of taxes upon national banks and their shareholders, with

[13] Northwest Airlines v. Minnesota, 322 U. S. 292, 303-304 (1944).

[14] Engaging in interstate commerce has never afforded sanctuary from state and local property taxation, even when unassociated with the conduct of intrastate commerce. American Refrigerator Transit Co. v. Hall, 174 U. S. 70 (1899). At one time, a showing by a non-transportation corporation that all of its activities within a state were incident to the conduct of interstate commerce protected it from a franchise tax measured partly by prorated net income and partly by prorated value of its shares of capital stock. Alpha Cement Co. v. Massachusetts, 268 U. S. 203 (1925). The doctrine on which this decision was based is losing ground and is not likely to survive another test in the Supreme Court. Cf. Stone v. Interstate Natural Gas Co., 103 F. (2d) 544 (C. C. A. 5th, 1939); Spector Motor Service v. Walsh, 139 F. (2d) 809 (C. C. A. 2d 1943). Even state gross earnings taxes on fractional parts of receipts from interstate commerce, though supplementing and not merely substituting for property and special-benefit taxes, are now likely to be sanctioned by the Court. Cf. Western Live Stock v. Bureau, 303 U. S. 250 (1938). Whether Congress, by breaking its silence on the Commerce Clause, could deprive the states of these prerogatives and of their even better-established authority to tax concerns engaged in both interstate and intrastate business is a question that cannot be answered on the strength of a single justice's dictum. See MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 156.

certain restrictions as to rates. Because of the section, banks are often subject to tax laws that apply to few other types of business and are exempt from tax laws that are applicable to business corporations generally.

Those who are familiar with Section 5219 will recognize it as a warning rather than a guide post. No matter how wisely drafted, an air-line counterpart of this section would preclude the application to air lines of established business tax institutions in some states and, by way of compensation, would permit the imposition of some taxes that are not applied to the business community as a whole. The states could not reasonably be expected to accommodate their general business tax structures to the Federal statute because of the insignificance of air-line taxes relative to total business tax collections. Consequently, the air lines would appear to be undertaxed when the Federal statute protected them from levies to which other enterprises were subject and would be exposed to overtaxation where the statute permitted levies that the state declined to generalize. Neither prospect is pleasing to the air lines, for they are too sensitive to public opinion to wish to escape what is popularly regarded as their fair share of the tax burden and too keenly aware of their political impotence in state legislative circles to wish to forsake the safety which lies in numbers. Nor have the states been endeared to differential taxation by their experience with Section 5219 or with the gross earnings taxes that many of them have substituted at one time or another for ad valorem taxation of railroad property.[15] It may therefore be predicted that air lines will continue to pay most of their state taxes under laws originally designed for other carriers or for the business community at large rather than under laws especially designed for them.

UNIFORM DEFINITION OF ALLOCABLE BASES

Since most tax liabilities are computed by multiplying a tax base by a tax rate, the limitation of state taxes on air lines may operate with respect to either or both of these factors in the equation. Moreover, the state tax base of an interstate carrier is derived by multiplying an "allocable base" (e.g., a unit appraisal of the operating property) by an allocation factor and adding the product to any nonallocable items that are subject to the tax. In the case of property taxes, the allocated portion of the tax base or both the allocated and unallocated portions must often be further multiplied by one or more equalization ratios in order to reduce them to local assessment levels. To be completely effective, Federal limitations of state taxes on air lines must deal with all of these factors in the equation used to determine the tax liability.

The typical state tax base includes both allocated and unallocated elements, but it is commonly assumed that any Federal definition of maximum state tax bases would be concerned principally with the allocated portion. The least that such a definition might do is to govern the division of a taxable characteristic into allocable and nonallocable items; for example, the Bulwinkle bill provides that the allocable

[15] CARRIER TAXATION, *supra* note 8, at 72, 133-135.

base of the property tax shall be all operating property except real estate and permanently located tangible personal property. If it were so minded, Congress, under authority of the commerce clause, doubtless could define the maximum allocable base for property taxation to include all operating property. But it is unlikely that Congress can either require or prohibit allocation of nonoperating property or nonoperating income.[16]

Having defined the maximum allocable base by exclusion of nonallocable items, the Federal law might go to almost any length in describing the manner in which the dollar value of the allocable base was to be determined. Thus, in taxing an air line which held only operating property, the states might be limited to normal net income for Federal tax purposes as the allocable base for net income taxes or to the book value of capital stock, surplus, and undivided profits as the allocable base for capital stock taxes. Such a limitation is not a true Procrustean bed, for it lops off the limbs of the tall guests without stretching those of the short ones. However, it may be assumed that the dimensions of the bed would be selected with the expectation that there would be some limbs to lop and that a considerable measure of uniformity of tax bases would thus be achieved.

Once agreement upon nonallocable items had been reached, a uniform definition of the maximum property tax base should be readily attainable, since market value is an all but universal assessment standard. True, there is some diversity among the states as to whether the initial objective is to arrive at the market value of the carrier as a going concern or to arrive at separate market values for various classes of assets or individual items of property. But this diversity presents no problem for Federal disposition once the assets have been divided into allocable and nonallocable elements: if the franchise is allocable, going-concern valuation is inevitable; if it is nonallocable, going-concern valuation is impossible. This follows from the fact that the franchise value is, by assumption, the difference between the going-concern value and the sum of the piece-meal values of all assets except the franchise.

The differences among states in their definitions of taxable net income are much more numerous,[17] and there are at least a dozen different tax bases among the thirty-odd state levies generically and not too accurately designated as capital stock taxes. Consequently, any "ceiling" definitions of taxable net income and capital stock that might be conceived for the air lines would almost certainly be broader than prevailing definitions in some states and narrower in others.

It is apparent that "ceiling" definitions of allocable bases by Congress would invite differential taxation of air lines in some states and virtually require it in others; and it was probably for this reason that the Civil Aeronautics Board refrained from recommending them. Whether the differential was favorable or prejudicial to the air lines would depend upon the height of the ceiling, the constitutional freedom of the states to segregate air carriers from other concerns for tax purposes, and the

[16] This is not to say that the states are free to allocate such property or income, but rather that the denial of the power to allocate is a function of the courts rather than of the Congress.

[17] MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 61-62..

willingness of the state legislatures to depart from the principle of uniformity where free to do so.

FEDERAL APPRAISAL OF ALLOCABLE BASES

Most proposals for uniform ceilings on allocable bases contemplate not only statutory definitions of the ceilings by Congress but also administrative determinations of the dollar values of the ceilings by Federal administrative agencies. If, for example, the definition of the Federal normal tax base is to be the ceiling for state net income tax purposes, then the Bureau of Internal Revenue's determination of the Federal tax base is to be used in computing the maximum tax that a state may levy upon net income; if net book value of flight equipment is to be the ceiling of the allocable base for state property tax purposes, then the Civil Aeronautics Board is presumably to determine the book value through its vaguely defined powers to regulate accounting procedures and practices.

Federal determination of allocable bases would have at least three advantages over decentralized determinations. First, it would protect the air lines from state importation of values through the medium of excessive appraisals rather than through the more orthodox route of excessive allocation fractions.[18] Second, it would eliminate the duplication of effort and added compliance costs inherent in separate determination of allocable bases by each of the states in which a single carrier operates. Finally, a Federal agency might be expected to perform this function more competently than any state agency, since it could employ specialized personnel who would devote themselves exclusively to air-line taxation and would gain special insight into the financial affairs of individual lines by reason of their familiarity with the affairs of competitive and complementary carriers.[19]

Despite these advantages, the prospects for Federal assumption of this aspect of state tax administration are not bright. The Civil Aeronautics Board found little support for this proposal among the state and local officials with whom its staff discussed airline taxation. Furthermore, the air lines are not now in a position to demonstrate that they have been injured by exaggerated appraisals of allocable bases by state or local tax administrators. The logic and economy of highly centralized assessment are therefore likely to fall victim to the doctrine of states' rights, a doctrine that is more obviously violated by Federal definition and appraisal of allocable bases than by Federal allocation between the taxing state and all others of an allocable base defined and appraised by the state.

UNIFORM ALLOCATION FORMULAS

It was an allocation problem that Northwest Airlines carried through the country's highest tribunal, and it is lack of uniformity in allocation practices that results in "multiple taxation" as the term is understood by the Civil Aeronautics Board.[20]

[18] This advantage would be particularly apparent in property taxation, since the allocable base for this tax, as presently conceived, depends so much upon the judgment of the assessor.

[19] Cf. NAT'L ASS'N OF ASSESSING OFFICERS, ASSESSMENT ORGANIZATION AND PERSONNEL (1941) 106-107.

[20] MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 27..

The Board has therefore proposed that each of the states levying a particular type of tax be required to use a uniform allocation formula, or a formula that produces a smaller allocation fraction, to the end that the several fractions used to divide a given carrier's allocable base among the states with taxing jurisdiction can never add up to more than one and will add to exactly one if each state chooses to avail itself of its full authority.

All allocation formulas are arbitrary in some degree, and there is no scientific method of measuring this degree. The selection of a uniform allocation formula is therefore a political process in the best sense of the term—a compromising of opposing interests without compromising of principles.[21] It is primarily for this reason that the writer favors prescription of the formula by Congress, a political body, rather than by a Federal administrative agency.[22] It is also the reason why Federal participation in the allocation process is more imperative than Federal participation in the determination of allocable bases. A carrier's net income or its value as a going concern cannot be determined exactly, but at least the determination can be based upon scientific principles and logical deductions from established facts. Such a determination can much better be left to the state administrative and judicial agencies than the determination of allocation formulas, a task to which the scientist and the logician can bring little special insight.

But there is more than a little danger that a Federally determined formula will prove unsatisfactory if it can be changed only by Congress. Some measure of discretion, albeit slight, should be vested in an administrative agency so that the formula may be modified to meet the unforeseen circumstances that are too limited in scope or too temporary in character to merit Congressional action. Such modifications, it may be predicted, would almost always be made at the behest of the air lines, not of the states. To a state, or even to a political subdivision of a state, the difference between the statutory formula and the modification which a Federal agency might make would be of little or no fiscal significance; to an air line it might make a considerable difference. But it does not appear that administrative modifications of a statutory formula would often be necessary or desirable, and it is hardly conceivable that a Federal agency, even though sensitive to the needs of the industry, would manipulate allocation formulas with the overt purpose of improving an air line's profit and loss statement.

[21] T. V. Smith, THE LEGISLATIVE WAY OF LIFE (1940) 77.

[22] It is widely held that state tax departments should be given great latitude in the formulation of allocation policies, and it is reasoned by analogy that a Federal agency should be given equal latitude in the event the Federal Government assumes responsibility for allocation of air-line tax bases. There is some reason to doubt the validity of this analogy. The most persuasive reasons for giving a state department free rein are to avoid the rather remote possibility of violating the commerce or due-process clauses of the Federal Constitution and to facilitate coordination with the policies of neighboring states in order to minimize multiple or fractional taxation. If interstate coordination and due process of law are to be achieved by exercise of Congressional prerogatives over interstate commerce, the proper analogy is with state apportionment of bases among the state's political subdivisions rather than with interstate allocation as now practiced. Intrastate apportionment is usually governed by rather rigid statutory formulas. See CARRIER TAXATION, *supra* note 8, at 125.

If the states are to use uniform allocation formulas, some Federal action is clearly indicated. It has been proposed that the several states individually adopt a uniform air-line property tax law. Probably some measure of success would be achieved if such a program were vigorously promoted. While it is hardly to be expected that all states would conform, the amount of multiple taxation might, in time, be reduced to negligible proportions. However, this is the hard way to achieve uniformity in allocation formulas. Moreover, it is a way from which there is no easy retreat. Experience with air-line taxation has been so limited, and the future of the industry is so unpredictable, that the chances of selecting in the first instance allocation factors which will prove permanently satisfactory are not great. It will be difficult enough to change a Federally defined allocation formula once vested interests are built up about it, even though it may be found to have distinctly undesirable characteristics; to change the formulas of forty-eight states and the District of Columbia without Federal coercion would be miraculous.

FEDERAL DETERMINATION OF ALLOCATION FRACTIONS

The translation of statutory allocation formulas into allocation fractions is a more or less mechanical process requiring the exercise of judgment principally in the interpretation of the terms employed in the formula and in occasional adaptations of the formula to unforeseen circumstances that make its literal application impossible or notoriously inequitable. Whether the translation should be performed centrally by a Federal agency, as proposed by the Civil Aeronautics Board,[23] or separately by each of the state or local governments with jurisdiction to tax is therefore a question on which no large volume of tax payments is likely to hang. The relative convenience of the two procedures and the possibility that one or the other will yield valuable byproducts, rather than their relative effectiveness in eliminating multiple taxation, should determine the choice.

Those who prefer decentralized computation of allocation fractions to Federal computation believe that this will contribute in some small measure to the preservation of states' rights[24] and, if coupled with statutory rather than administrative definition of allocation formulas, will forestall another small increment in the Federal bureaucracy. On the other hand, the proponents of Federal computation believe that a central administrative agency is needed in at least the early stages of the experiment to interpret the terms of the allocation formulas, to appraise the success of the program, to bring promptly to the attention of the Congress the need for modification of the Federal statute, and to study the economic and political implications of an extension of the program to other carrier groups, such as the fixed-base

[23] MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 7-8, 47-50.

[24] As a matter of fact, the states would participate less actively in the allocation process under the so-called self-executing statute than under the CAB proposal. The CAB proposes that the states, through the Council of State Governments, nominate the members of an advisory committee which would assist the Federal allocation agency. The ministerial function of computing allocation formulas—the only state function with a "self-executing" statute—would be but one of the duties of the allocation agency and its advisory committee.

operators and the international carriers. Above all, the latter group believes that at least a small amount of discretion with respect to the formulas themselves should be vested in some Federal agency and that the computation of the allocation fractions would be a natural complement to any such function.

FEDERAL LIMITATION OF STATE TAX RATES

If the air lines are to be given full protection against punitive taxation by the states, it is necessary to limit tax rates as well as tax bases. The Civil Aeronautics Board recognized this problem by urging that air lines be subjected by the states to the same taxes as other business enterprises but did not recommend legislation to assure such treatment. It has been proposed in other quarters that a state, in levying any particular tax, be limited to the lowest rate imposed upon any other type of carrier and the highest rate levied on business corporations generally.[25]

Rate limitation poses technical problems far greater than those involved in current proposals to limit tax bases. It is generally agreed that rate limits must be expressed in relative rather than absolute terms; neither the states nor the air lines would relish politically feasible limitations expressed directly in numerical values. The problem is to find a proper comparative in the diverse tax systems of the forty-eight states. The experience of the states with the "other moneyed capital" comparative in Section 5219 illustrates the disruptive influence of this type of legislation; and one would not be aspiring to the ranks of the major prophets to predict a similar experience with a limitation of air-line tax rates. Even if it were possible to avoid immediate conflicts with established tax institutions, future conflicts would inevitably arise as the states endeavored to change their tax systems to conform to new circumstances and new concepts of tax equity and expediency.

It may be seriously questioned whether the air carriers need protection against excessive tax rates even though the states are, admittedly, constitutionally free to tax them out of existence.[26] If air lines owned their ways and terminals, as the railroads do, there would be some danger that taxes might approach the lethal level once air transportation had reached a state of relative maturity. But the history of water-carrier taxation is probably a much better basis on which to predict the future of air-carrier taxation. Neither water carriers nor air carriers are tied to a particular location by extensive real property ownership. Both are eagerly sought after—as railroads once were—by rival ports. Both are objects of public solicitude because they afford the means of transporting personnel and supplies to those places from which military attacks against the United States are likely to be launched. And, despite the maturity of water transportation, neither industry as a whole has been severely burdened by state and local taxes.[27] It is true that air lines are already subject to

[25] MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 138. The proposed property tax limitation is expressed differently (*id.* at 140) but produces somewhat similar results. The flight equipment of air lines, for example, is to be taxed at not more than the average rate of tax on tangible personal property throughout the State.

[26] Nashville, Chattanooga & St. Louis R. R. v. Browning, 310 U. S. 362 (1940).

[27] CARRIER TAXATION, *supra* note 8, at chs. V, VI and VIII.

burdensome motor fuel taxes in some states and that these taxes, in the absence of Federal intervention, seem more likely to spread than to recede.[28] But some of these taxes were inadvertently conceived, and the proceeds of many of them, however badly divided among the states, are earmarked for expenditure by aviation commissions on activities that are of some slight benefit to the air lines. That the states will deliberately subject the air lines to general taxes (as distinguished from special-benefit taxes) more burdensome than the lowest general taxes imposed upon competitive transportation agencies seems distinctly improbable, and only states with heterogeneous business taxes are likely to subject air carriers to levies that are not applicable on equal terms to the general business community. It is questionable, therefore, whether the program for elimination of multiple taxation—the original sin in which the Civil Aeronautics Board's study of air-line taxation was conceived—should be jeopardized by being linked to a proposal that is certain to be regarded as a severe blow to state sovereignty.

TAXATION OF AVIATION FUEL

The chief danger of unduly burdensome taxation of air transportation lies in the realm of special-benefit taxes. Of these, only the motor fuel taxes are of present fiscal significance.

The Civil Aeronautics Board holds that there is a conclusive case against continuance of state aviation fuel taxes.[29] The special committee designated by the Secretary of the Treasury to conduct a study on intergovernmental fiscal relations, while not as unequivocal, was apparently of similar mind.[30] Even the North American Gasoline Tax Conference's Committee on the Taxation of Air Lines, a group composed entirely of state officials, was divided over the question.[31] It may be concluded from these expressions and from the fact that over half of the states of the Union have voluntarily refrained from taxing aviation fuel that the weight of opinion opposes exploitation of this source of revenue by the states and their political subdivisions.

It is another question whether the Congress should summarily eject the states from this tax field. Members of the Civil Aeronautics Board, one may infer, would gladly offer to the states exclusive rights to highway fuel taxes as a quid pro quo for evacuation of the aviation fuel tax field. Realizing, however, that the highway fuel tax was not theirs with which to bargain, they have contented themselves with the recommendation that the Secretary of the Treasury consult with the governors and fiscal authorities of the states with respect to the whole subject of motor fuel taxation and that he recommend to Congress a program for the removal of the impediments to a healthy development of civil aviation inherent in state taxes on aviation fuel.[32]

[28] In the 1945 legislative sessions alone, Minnesota and Montana were added to the list of 20 states previously taxing aviation fuel used in interstate operations and Oklahoma raised its tax on such fuels.

[29] MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 64.

[30] FEDERAL, STATE, AND LOCAL GOVERNMENT FISCAL RELATIONS, SEN. DOC. No. 69, 78th Cong., 1st Sess. (1943) 18.

[31] MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at 123.

[32] *Id.* at 9-10.

There is perhaps a stronger possibility that the states will abandon aviation fuel taxes than that the Federal Government will do so. The Committee on Intergovernmental Fiscal Relations suggested that the Federal Government occupy this tax field exclusively, using the proceeds to finance the construction and maintenance of free public airports, the laying out and maintenance of beacon systems, the provision of weather information, and the regulation of pilot licensing.[33] Similar effects upon air transportation would flow from the recommendation of the Board of Investigation and Research that the Federal gasoline tax be identified as a user tax and the portion of the proceeds derived from aviation fuel be expended on the Fedral airways.[34] It is because the amount of gasoline put into the fuel tanks of a plane at a particular port bears no reasonable relationship to the benefits conferred upon the operator of this plane by the state and local governments with taxing jurisdiction at the port that state imposts on aviation fuel are condemned; and it is because fuel consumption is closely related to benefits received from Federal provision of aids to air navigation that a Federal tax on the same base is favorably regarded.[35]

TAXATION OF FIXED BASE OPERATORS

The recommendations of the Civil Aeronautics Board of the elimination of multiple taxation apparently relate only to the common-carrier air lines. Although contract- and private-carrier operations have developed to only a limited extent in the aviation industry, there is every reason to suppose that they will, in time, expand to substantial proportions and raise tax problems not unlike those raised by the common carriers.

There is little precedent for the allocation of the property tax base of the contract and private air carriers. Several states tax the property of contract highway carriers on an allocated basis, but the constitutionality of this procedure has not been tested in the Supreme Court. Against its validity one may array a long line of decisions relating to the taxation of watercraft[36] and the one decision on taxation of aircraft.[37] The latter decision may well be accepted as controlling if Congress remains silent as to this type of air carrier. Whether this decision sanctions taxation of planes at their bases or at the domiciles of their owners is a question which the Supreme Court has left unanswered but which most states may be expected to resolve in favor of plane headquarters.

Like the property tax, most of the other state taxes now imposed upon fixed-base plane operators are levied upon unallocated tax bases. The constitutionality of net

[33] SEN. DOC. No. 69, *supra* note 30, at 18. [34] CARRIER TAXATION, *supra* note 8, at 1.

[35] The considerations that have saved motor vehicle registration taxes from displacement by motor fuel taxes may eventually induce the Federal Government to supplement its aviation fuel tax with a tax that is progressive rather than regressive with respect to the size of the plane.

[36] This series culminated in Southern Pacific Co. v. Kentucky, 222 U. S. 63 (1911). None of the cases involved a tax based on an apportionment of a unit appraisal; but, since several of them sustained the right of a single state to tax the full value of a vessel or a fleet of vessels, it has been widely assumed that no other state could tax a portion of such value. See CARRIER TAXATION, *supra* note 8, at 268-272.

[37] Northwest Airlines, Inc. v. Minnesota, 322 U. S. 292 (1944).

income and privilege taxation by states whose landing fields are used as ports of call rather than home ports is established only in the event the carrier has qualified to do an intrastate business, and the states have had little occasion to go beyond these narrow limits. Aircraft registration fees are still few in number and nominal in amount. Multiple taxation is therefore more of a prospect than a reality for the contract air carriers and holds even fewer terrors for the private carriers.

The allocation formulas recommended by the Civil Aeronautics Board are readily adaptable to the contract carriers, since they are not dependent upon fixed routes or fixed schedules. But whether these or some other allocation procedures should be applied to the nonscheduled carriers is a question which may well await a fuller flowering of this branch of the aviation industry and the accumulation of experience with their regulation and with the allocation of the tax bases of the common carriers.

TAXATION OF INTERNATIONAL CARRIERS AND FOREIGN-FLAG LINES

The Civil Aeronautics Board also excluded from the scope of its recommendations the international carriers, whether incorporated in the United States or elsewhere.[38] These carriers present problems not found in the field of domestic transportation because they become subject to the taxes of two or more sovereign nations.

In all probability, the taxes that foreign nations may impose upon United States carriers will, in time, be settled by reciprocal treaties. Although these treaties will undoubtedly control, and perhaps even prohibit, state and local taxation of foreign-flag carriers whose routes reach or cross the United States, they will not deal with state and local taxation of the American-flag lines. Nor is there any necessary reason why state and local tax policies with respect to United States corporations should be influenced by these international treaties. Each state need only compute its tax base by treating a foreign country as the equivalent of another state. In the event such taxation places the American-flag operators under a competitive handicap as compared with foreign-flag lines, the remedy lies in Federal subsidies rather than in exemption or preferential taxation by states and their political subdivisions.

It has been tentatively suggested by the Civil Aeronautics Board that international multiple taxation of air commerce be eliminated by means of reciprocal treaties making an air carrier subject to the exclusive tax jurisdiction of the country in which it is organized and its planes are registered.[39] If such treaties are concluded and the states regard foreign countries as the equivalent of other states in the allocation process, an American-flag international carrier will be subject only to Federal taxation on that portion of its taxable capacity allocated to foreign countries. Other things being equal, this will result in a tax burden upon international air transporta-

[38] There is some implication, as well, that the territorial carriers are not covered. See MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at v. However, since flights between two territories or between a territory and the States present no multiple-tax problems not raised by flights between noncontiguous states, it seems likely that the Board's desire to give further study to the taxation of territorial carriers arises from its directive to study unduly burdensome taxation rather than from the multiple-tax directive.

[39] MULTIPLE TAXATION OF AIR COMMERCE, *supra* note 4, at v.

tion that is somewhat lighter than the burden imposed upon domestic air carriers or the domestic segments of carriers engaging in both domestic and international operations. But this is likely to be only one of the factors—and a minor one at that—which preclude the equation of marginal dollars of investment. The important objectives are to secure an appropriate division of international traffic between the air carriers and other media of transportation and to assure the survival of American-flag international carriers as long as they are able to maintain standards of service and of operational economies that compare favorably with those of foreign-flag carriers. The Civil Aeronautics Board's tentative suggestion, while lacking the rigorous logic of a proposal to treat all carriers alike regardless of nationality, is probably as well adapted to the achievement of these objectives in a nationalistic world as the alternative.

INFLUENCES AFFECTING INTERNATIONAL AVIATION POLICY

THOMAS BURKE*

Transportation has a fundamental relationship to every phase of a nation's well-being. The economic and cultural maturity of peoples and their governments depends upon it. The United States and Great Britain are classic examples of the application of that principle; our neighbors of the Western Hemisphere, including Canada, vividly demonstrate its less aggressive application. Therefore, the development of the airplane as a practical means of transporting passengers and cargo has had a profound impact on the social, political and economic life of every nation on earth.

As a matter of record, the airplane did not become a serious factor in transportation until after World War I. In fact, the technical development of aeronautics is traceable to the stimulation which it received between 1914 and 1918. During that period the military authorities of the world recognized the airplane as an important instrument of reconnaissance and destruction. The exploitation of its lethal qualities laid the groundwork for the development of its peace-time potentialities. Experience gained in World War I served to emphasize the fact that aviation could no longer be treated as an exotic experiment.

As the direct beneficiary of this development, our air transport industry promptly proceeded to link the resources and markets of the United States and Latin America to a web of air routes. The resulting intensification of travel had a tangible effect on every state in the Union and on our sovereign neighbors throughout the Western Hemisphere. One thing is certain: the advent of practical air transportation in the Americas served to destroy the political vacuum in which we had lived since the Monroe Doctrine was promulgated.

In so far as the United States is concerned, the phenomenal advancement of its domestic air transport industry resulted in cultural as well as commercial benefits. The sheer dynamics of aviation and the uninhibited air element in which it functioned were psychological factors of vast importance. However, it is noteworthy that, aside from the experience gained in Latin America by Pan American Airways and its affiliates, this new form of transportation was considered mainly as an adjunct of the home economy. Such an attitude is attributable mainly to the fact that the United States was the most ideal laboratory on earth in which to conduct the experiment. On the other hand, the air transport systems of Europe were nurtured

* Former Chief of the Division of International Communications, Department of State (1938-1944).

on a diametrically opposite philosophy. This is singularly true of Great Britain and the Netherlands because of the nature of their geographical and economic interests. In other words, their far-flung possessions and their dependence on foreign commerce made it imperative that their air transport systems be preponderantly of an international character. It is to such fundamental considerations as these that we may look for an explanation of the confused and restricted growth of international aviation policy.

The determination of the international air policy of the United States calls for consideration of two factors: (1) the operations of United States flag lines in international commerce, and (2) the operations of foreign flag lines on a reciprocal basis to or within United States territory. Between World War I and the passage of the Civil Aeronautics Act in 1938, various divisions and bureaus of the Department of Commerce were entrusted with the regulatory and policy-making responsibilities, chiefly in connection with the domestic aspects of aviation. However, when the first American flag air carrier ventured across our national boundaries, new complications arose which promptly aroused the interest of the Department of State. Therefore, in 1926 the Congress of the United States passed an act "to encourage and regulate the use of aircraft in commerce and for other purposes." This act, which became known as the Air Commerce Act of 1926, defined "air commerce" as "transportation in whole or in part by aircraft of persons or property for hire, navigation of aircraft in furtherance of business, or navigation of aircraft from one place to another for operation in the conduct of a business." It then went on to state that the term "interstate or foreign air commerce" meant air commerce between any state, territory or possession, or the District of Columbia "and any place outside thereof." Although the Air Commerce Act of 1926 was a progressive step, it failed to meet the demands placed upon it by the rapidly growing air transport industry. Twelve years later the Congress enacted the Civil Aeronautics Act of 1938.[1] Although far from perfect, the 1938 Act has proven to be extremely satisfactory. Under it there was created an administrative organization, known as the Civil Aeronautics Authority. It was comprised of five members, an administrator and an Air Safety Board. Approximately two years later, as the result of President Roosevelt's desire for intra-departmental reorganization, the Civil Aeronautics Authority was redesignated as the Civil Aeronautics Board, and has continued to function as such since that time. The general powers and duties of this agency are described in Title II, Section 205, as follows:

"a. The Authority[2] is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or specific rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

[1] 52 STAT. 977 (1938), 49 U. S. C. §401 *et seq.* (1940).
[2] Amended by the Act of July 2, 1940, Pub. L. No. 721, to read: "The Civil Aeronautics Board."

This authorization is significant against the background of policy declared in the 1938 Act, in which policy the international aspect of aviation conspicuously appears.[3] Aside from comprehensive rules and regulations in connection with the conduct of our domestic air transport system, the Act contains provisions concerning the issuance of certificates and permits for international operations by American and foreign air carriers. These provisions wisely recognized air transport as an instrumentality of national policy. This is borne out by the comprehensive "international" provisions of the Act, such as those requiring the approval of the President[4] and prescribing the functions of the Secretary of State[5] in certain situations.

For a considerable time prior to 1938 a strong trend toward centralized authority was taking place throughout the world. The corollary of this trend was an upsurge of government intervention and, in many instances, government ownership. By the time Hitler's armies overran Poland, very few truly independent private business enterprises existed except in the United States. Official channels became the chief means of communications between peoples, and the conduct of international relations rapidly became an amalgam of "joint undertakings" involving economic, diplomatic and military considerations.

By the fall of 1939 the principle of "mutual aid" had been fully aroused from its peace-time dormancy and burgeoned prolifically until the surrender of Japan.

[3] Sec. 2 of the Act, 49 U. S. C. §402 (1940) is headed "Declaration of Policy," and provides:

"In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

[4] Sec. 801 of the Act, 49 U. S. C. §601 (1940) provides: "The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the Persident before publication thereof. This section shall not apply to the issuance or denial of any certificate issuable under section 401(e) or any permit issuable under section 402(c) or to the original terms, conditions, or limitations of any such certificate or permit."

[5] Sec. 802 of the Act, 49 U. S. C. §602 (1940) provides: "The Secretary of State shall advise the Authority of, and consult with the Authority concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services."

Most of the special "privileges" granted thereunder are "for the duration." Therefore it is likely that they will be terminated on short notice unless their prolongation is formally approved by the government or governments that granted them. This will bring into sharp focus the "privileges" granted by certain of the United Nations to the Air Transport Commands of the Army Air Forces and "NATS," its Navy counterpart. The extent and significance of these air transport operations is evident in the performance of the Army Air Force organization which is the larger of the two services. By the fall of 1944 the international routes of the Air Transport Command were extended to approximately 160,000 miles and literally gridironed the face of the earth. In the spring of 1945 its "ferrying" and "transport" operations accounted for a total of nearly one and one-half million "flown" miles per day.

However, the greatest significance of the Air Transport Command operation lies in the fact that its diversified and extensive war-time activities were carried on in considerable proportion by private American air transport companies that were, in effect, sub-contractors of both our Army and our Navy. Thus our private air carriers accumulated an incalculable amount of international experience and created for their industry a fund of prestige from which they may be expected to draw in the days that lie ahead of us. On the other hand, the operating "privileges" extended to the Air Transport units of our Armed Forces on the basis of "military necessity" may prove to be a distinct liability when our government attempts to convert them into peace-time commercial "rights." In other words, the formidableness of our private international air carriers may add to the sum total of the psychological obstacles which will be encountered by our State Department negotiators. In fact, it is apparent that the prestige which has accrued from the global air transport activities of our military establishments is believed by important British economists to constitute a dire threat to the trade position of the Empire. Thus it may be expected that international air transport policy will not be considered solely from the standpoint of aviation but, unfortunately, is likely to become engulfed in broader considerations that each nation in its sovereign judgment deems to be necessary. For instance, the tremendous impact of the war on the economy of Great Britain is unquestionable. Regardless of the denials of her statesmen, she is in serious difficulty and undoubtedly will resort to the most drastic practises in order to regain her equilibrium. Also, Russia's unpredictableness in that regard will serve further to confuse the issues.

If we concede the vital importance of Great Britain and Russia in the shaping of the postwar world, then it is imperative that we properly evaluate their respective positions concerning international civil aviation. If we analyze the British position from the standpoint of her past as well as her present situation, it will not be too difficult to blueprint the motives behind her sometimes conflicting positions. The same may be said of Russia, although the latter is infinitely more complicated and difficult to analyze. Nevertheless, it would seem reasonable to assume that, in no small measure, the attitudes of Britain and Russia are chargeable to diplomatic

maneuvering. However, regardless of the dissimilarity of their motives and objectives, both governments have one thing in common: they consider non-military aviation strictly as an economic dependency and therefore refuse to view its development except in relationship to overall policy.

On the other hand, the United States has appeared from time to time to favor the view that business considerations should not be permitted solely to influence international air transport policy, since cultural and security values "vital to the future of mankind" are involved. Thus many interested United States officials hold that aviation policy should be worked out independently of other problems. In that connection, the following views were expressed by Mr. Welch Pogue, Chairman of the Civil Aeronautics Board:[6]

> "Indeed they are complex in the extreme. They are interrelated with many matters of national concern and inject new considerations into the international field, a field already filled with difficult issues. We make our first mistake, therefore, if we blithely approach these problems upon the assumption that the future of aviation can be readily worked out more or less as an incident to the consideration of other problems."

From the viewpoint of the United States it would appear to be logical and sound to segregate international aviation problems from "interrelated matters" or, as is frequently the case, matters that are utterly unrelated. Unfortunately, however, the international air transport policy of the United States, unlike its domestic counterpart, must be patterned in such a manner as to make it reasonably acceptable to the sovereign governments whose airspace, terrain or territorial waters we would seek to utilize. Experience shows that, aside from certain mutually desirable basic principles, the tendency of all governments is to reserve definitive commitments for country-to-country (bilateral) negotiations. Thus the specific subject of air transportation invariably has become "incidental" to other considerations.

Although many aviation devotees feel that such a situation is highly undesirable, the fact remains that it is identical with the principles that are commonly employed in domestic commercial strategy. It would be the height of naïveté to contend that the United States desires an "open sky" primarily to improve the welfare of mankind. By the same token, it would be unfair to contend that the refusal of Great Britain or any other nation to conform to our views is necessarily reprehensible. Once again we are confronted with an attempt to rationalize an international problem on the notably fallacious and dangerous theory that since the "open sky" principle would conform to the requirements of the United States, it should be acceptable to the rest of the world—regardless of any political or economic incompatibilities that may exist. This line of reasoning is usually accompanied by carefully chosen slogans concerning human progress and liberty, which have the effect of putting the nations that would oppose it in the position of being literally anti-social. The natural concomitant of such tactics is friction, which in the long run produces nothing better than angry and unsatisfactory compromises.

[6] Address delivered at meeting of National Aeronautics Association at Minneapolis, Minnesota.

Perhaps it would be well briefly to consider the diplomatic background of international aviation in order to obtain a clearer understanding of the principle of "air sovereignty" which, having survived since the heavier-than-air craft became a practical means of transportation, still remains as the most potent obstacle to the practical liberation of the world's airways.

There is common agreement among students of aviation history that the Air Navigation Convention concluded in Paris in 1919 laid the cornerstone of international aviation policy. Although the Paris Convention was not formally accepted by the United States Government, it has in certain aspects withstood the test of time. In fact, it is noteworthy that it has been used as a pattern for all of the subsequent bilateral and multilateral international aviation commitments that have been entered into by our government. Ratification by the United States of the Havana Convention in 1928, and its adherence to the Warsaw Convention of 1939, served to etch more deeply the basic principles contained in the Paris Convention. However desirable these undertakings may have been, they were not sufficintly comprehensive to keep pace with the rapid growth of the world-wide air communications.

Perhaps the most commonly recognized principle contained in the Paris Convention concerns the question of air sovereignty. This restrictive principle has provoked many attempts to establish an analogy between maritime transportation and the relatively new art of air transportation. In view of the importance of ridding aviation policy of any inherited inhibitions, a brief reference to the origin of the principle of "freedom of the seas" would appear to be in order. In that connection, Dr. D. Goedhuis, lecturer in Air Law at Leiden University, holds the following views:[7]

"Before, however, considering the results attained at these three international conferences, attention may be drawn to the fact that in international communications certain basic principles remain the same in cause and in effect from age to age. Thus, through the establishment of the great maritime routes, resulting from the discovery of the passage by the Cape of Good Hope and the discovery of America, the world acquired an entirely new aspect: the importance of portions of the earth and their consequent interest to mankind were fundamentally changed by maritime navigation. In a study of the character of maritime navigation, two main elements should be distinguished: (1) the social element, 'man's union with man,' and (2) the element of power, which is to be subdivided into the economic instrument and the potential military instrument. The second element has led in the history of the sea to rivalries often culminating in violence; the first element, however, has caused the law of nations to score its first successes by reducing the pretensions of states to the exclusive use of the sea. Through the conquest of the airspaces the aspect of the world has changed in the same way as it was changed in the sixteenth century through the conquest of the seas. The bases of economic and political power are being gradually shifted and national ambitions transformed; and in the future air commerce will exercise an ever-growing influence upon the wealth and strength of nations. The air will become more and more, therefore, not only a scene of commercial activities, but of political developments, and the question of air routes will soon emerge as one involving some of the primary objects of the external policy of nations.

[7] D. Goedhuis, *Civil Aviation After the War* (1942) 36 AM. J. INT.-L. 596.

"In air navigation the same two main elements can be distinguished as have been determined in sea navigation. As through air navigation, however, the limitations of time and space which nature imposes upon man are overcome to an even greater extent than through navigation by sea, the social importance of this newest means of communication surpasses that of all the older means. Since the economic strength represented by air routes constitutes, as does that of sea routes, an instrument of political power, neither of them can, even in the purely economic field, be separated from politics. As far as potential military value is concerned, especially for ancillary services, such as training, supply, and troop carrying, again an analogy exists, though in aviation the threat from a military point of view is even greater than in sea navigation, the former penetrating to the heart of a country, horizontally as well as vertically, and practically knowing no bounds.

"A clear realization of the analogies in the problems of sea and air communications is a necessary precedent to the formulation of those ideas which are to determine the future status of the air.

"Taking into account the two main elements in air communications that have been distinguished, the international rules which are to govern these communications should satisfy two fundamental conditions. They should further the development of air navigation as much as possible; but, as this development will necessarily lead to rivalries, the rules should be such as not to create a sense of injury or injustice which would cause the rivalries to culminate in violence."

It becomes important, therefore, to understand the principle of "air sovereignty" not only because of its common acceptance but because of its deep-rooted emotional significance. In substance, it asserts that (1) each state has sovereignty over the air space directly above its territory and territorial waters; (2) each state may decide in its discretion to permit any foreign aircraft to use the air space under its sovereignty.

Prior to the Paris Convention, various theories had been advanced by reputable sources with respect to the extent to which the air space might be used as a means of transportation. Two major theories appear to have been advanced. Proponents of one theory held that the air was absolutely free and that it could not be subjected to the control of any country. Later certain proponents of this theory modified their position by holding that the air space closest to the earth "into which structures on the surface extended" should be subjected by the subjacent state to such restrictions or prohibitions as were deemed to be appropriate. This school of thought held that the air space above the height of structures on the surface up to the highest altitude which could be reached by aircraft should enjoy complete freedom from restrictions.

The proponents of the second theory refused to compromise in any manner and bluntly held that the air space was a part of the territory belonging to the subjacent state and was subject to the exercise of the sovereignty of that state.

The practical application of these two major theories received serious consideration from the Institute of International Law and the International Law Association prior to the adoption of the Paris Convention. However, the framers of the final Convention settled the question by providing an article which stated that "the High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory." Thereupon each of the contracting

states undertook to accord "freedom of innocent passage" above its territory to the aircraft of the other contracting states. Article 15 of the Convention provided, in part: "Every aircraft of a contracting state has the right to cross the air space of another state without landing. In this case it shall follow the route fixed by the state over which the flight takes place." However, in the third paragraph of Article 15, the following language occurs: "The establishment of international airways shall be subject to the consent of the states flown over." If we apply the yardstick of practical experience to Article 15, we inevitably reach the conclusion that, aside from strictly academic discussions, it has resulted in according a limited freedom of passage in the time of peace to private aircraft, but has given no such freedom to regularly scheduled commercial air carriers. In the meantime, the United States Government has recognized the right of each country to require prior authorization for the establishment and operation of a regular air transport service for foreign aircraft over its territory. In 1929 at the Extraordinary Meeting of the International Commission for Air Navigation, only four of the 31 participating countries voted in favor of freedom of passage in international air commerce. At the conclusion of this meeting, the text of Article 4 was amplified to read as follows: "Every contracting state may make conditional on its prior authorization the establishment of international airways and the creation and operating of regular international air navigation lines, with or without landing, on its territory." Also, Article 15, as amended, makes it possible for the contracting parties to impose more specific restrictions on foreign air carriers within their air space. The right to restrain the foreign aircraft from flying over certain "prohibited areas" or "in exceptional circumstances" is to be found among these restrictions.

The influences of the Paris Convention are best demonstrated in the following air conventions and agreements which the United States has entered into with other sovereign states since 1919. The multilateral undertakings are the Conventions of The Hague, Warsaw, and Havana, and the bilateral agreements are with Belgium, Canada, Colombia, Denmark, France, Germany, Great Britain, Iceland, Irish Free State (Eire), Italy, Liberia, Mexico, the Netherlands, New Zealand, Norway, Spain, Sweden, and the Union of South Africa. They include such subjects as reciprocal recognition of certificates of airworthiness for imported aircraft, air navigation, certificates of competency or licenses for the piloting of civil aircraft, and air transport services. Upon examining these records, it becomes apparent that little or no difficulty was experienced in arriving at international understandings in matters pertaining to the technical aspects of aviation. However, it becomes equally apparent that a restrictive tone permeates practically all such undertakings in so far as the granting of "rights" is concerned.

Obviously, the parties to the great majority of the formalized diplomatic undertakings other than the bilateral air transport agreements merely extended general privileges which carefully avoided impingement upon the principles of "air sovereignty." In other words, the sum total of the multilateral conventions of Paris,

Havana, The Hague, and Warsaw, and the preponderant part of the bilateral agreements to which the United States Government became a party, are innocent of any abridgment of the "sovereignty" principle. Ambiguities abound in all of the multilateral conventions with the possible exception of the Havana document, which, nevertheless, still invites interpretative arguments.

Therefore, it is significant that, twenty-five years after the Paris Convention, the United States delegation at the International Civil Aviation Conference (held at Chicago between November 1 and December 7, 1944) maintained the view that:[8]

"Worldwide development of civil aviation is a powerful force for world unity and world peace;

"A general system of rights for planes to travel and to carry international commerce should be set up, becoming the established custom of commerce by air, as similar arrangements have become the settled law of commerce by sea;

"These rights of transit and commerce should be available to all nations, permitting equal opportunity and reasonable competition; and

"All nations should join in a world organization designed both to prevent competitive excesses and exploitation, and to maintain technical facilities and standards."

In the cold light of retrospection, the progress made at the Chicago Conference is regrettably overshadowed by the fact that the unenlightened principle of "air sovereignty" escaped serious impairment. The use of the terms "freedoms" in connection with the Air Transport Agreement of the Final Act of Chicago obviously was a psychological experiment, but it did not impress many of the really important conferees. After the opening session of the Conference it became apparent that the American conception of "freedom" was at considerable variance with the view of the United Kingdom and of many other nations. This basic irreconcilability had a most undesirable effect upon the final outcome.

Shortly before the Chicago Convention was convened, the press of the United Nations was almost unanimous in pointing out the dire need for "teamwork and understanding engendered in the war effort" in order to avoid "the selfishness and stupidities of the past." None was more eloquent than the *London Times,* which recommended in its editorial columns that nothing be left undone to achieve in Chicago "the fullest and freest exploitation of the new power of flight with its untold benefits to all the world." The position that was taken by the British delegation at Chicago was, to say the least, at considerable variance with such views. However, that should not have been surprising.

The *bête noire* of the Final Act of Chicago was and still is Paragraph 5 of Section 1 of the International Air Transport Agreement. In other words, it is the fifth of the so-called "Five Freedoms." It reads as follows:[9]

"(5) The privilege to take on passengers, mail and cargo destined for the territory of any other contracting state and the privilege to put down passengers, mail and cargo coming from any such territory."

[8] Adolf A. Berle, Jr., *Freedoms of the Air* (March, 1945) 190 HARPER'S MAG. 327.

[9] See DEP'T OF STATE, INTERNATIONAL CIVIL AVIATION—FINAL ACT AND RELATED DOCUMENTS (1945) 91 for text of this Agreement and this paragraph.

Although the British subscribed to the Transit Agreement and to a plan for a permanent international aeronautical organization, they refused categorically to subscribe to Section 5. Their objections were characteristically realistic and, to most observers, had an undertone of fierce determination to prevent any further encroachments on their weakened economic position.

Approximately three months after the Chicago Conference, former Assistant Secretary of State Adolf A. Berle, Jr., its chairman, made the following brief summary of what he considered to be the essence of the Final Act of Chicago:[10]

"The results are what count. The conference obtained:

"1. Agreement to a method of international organization, calling for an air council and for annual air meetings.

"2. An agreement, familiarly known as the 'two freedoms'[11] agreement, by which all of the nations which sign it exchange among themselves the privilege of going through the air of one another's countries along reasonably direct routes (which, however, may be designated in each country), along with the privilege of landing for refueling, repair, and the like. This amounts to a generalized right of transit for a plane to go from its own country by reasonably direct route to and through other countries, and to refuel and overhaul on the way. As of January 19, 1945, this document has been signed by representatives of twenty-nine countries, whose area includes more than half of the area of the globe and an overwhelming majority of its population.

"3. A second instrument, known as the 'five freedoms'[12] agreement, consists of a mutual exchange of privileges not only to transit, but to take on and discharge traffic, including not only traffic between the country of the plane's origin and the country of its landing, and from there back home again (the third and fourth freedoms in the Canadian analysis) but also the privilege of picking up traffic en route. This last is essential, of course, if long lines are to be maintained; for airlines, like shipping lines, subsist not merely on traffic from the homeland to other countries and back, but also on traffic between points on the way. Again at the date of this writing, this agreement had been signed by some eighteen nations and several more had indicated their intention of signing it.

"These agreements, taken together, open whole subcontinents to peaceful air commerce. Any country, by adhering to the documents of the two freedoms and the five freedoms, may at once enter this already great and growing basin of air commerce. There were no such opportunities open before."

Although, as Mr. Berle stated, a heartening number of delegations "signed" the "Five Freedoms" agreement, it is noteworthy that ten months after the Conference was concluded only nine governments have formally accepted it. They are: Afghanistan, China, El Salvador, Ethiopia, Liberia, the Netherlands, Paraguay, Turkey (with reservations) and the United States.[13]

[10] Berle, *supra* note 8. [11] Text is found in *op. cit. supra* note 9, at 87. [12] See *supra* note 9.

[13] In an article entitled *The Chicago Air Conference—Accomplishments and Unfinished Business*, Mr. Edward Warner, former Deputy Chairman of the Civil Aeronautics Board, said: "The main unfinished business at Chicago concerned the rights of conducting trade. The two-freedoms agreement on transit will enable commercial aircraft to go wherever trade is to be found; but actually to engage in picking up and discharging passengers and goods will be possible only in the territories of the limited number of states which have signed the five-freedoms agreement. If trade is to be carried on, either a new attempt must be made to find a general formula or a network of bilateral, trilateral and quadrilateral pacts must be negotiated." DEP'T OF STATE, BLUEPRINT FOR WORLD CIVIL AVIATION (Pub. No. 2348, Conf. Ser. 70, 1945).

In other words, 45 out of the 54 governments that attended the Conference appear to have decided that their best interests would not be served if they became parties to a multilateral agreement which would deprive them of the bargaining advantages inherent in the bilateral type of negotiation. Certainly the importance of the position taken by Great Britain cannot be minimized; nor can Russia's refusal to participate be ignored. The same may be said of several other strategically located nations that have shown no interest in the ultra-liberal American proposal. However, it is not too optimistic to assume that when some of our valiant comrades across the seas have had an opportunity to bind their wounds, they may undergo a decided change of attitude toward the "Fifth Freedom" and its antithetical principle —"air sovereignty."

Many serious students of international relations feel that the Chicago Conference failed mainly because the American delegation lacked the sure instinct and vision to neutralize in some degree the frank concern of many nations regarding the overpowering superiority of American air transport enterprises. The argument is advanced that because of the radical nature of Paragraph 5 of the "Five Freedoms" its inclusion in the Final Act of Chicago was inept and amateurish. In other words, it is felt that the American delegation "won a skirmish and lost a battle" as the result of its impetuousness. On the other hand, there is a strong feeling that a modification of Paragraph 5 could have been put into effect at a later date in country-to-country (bilateral) agreements. In any event, we must face the fact that in the immediate future our former allies will be more concerned with the stark realities of postwar survival than we may have the capacity to understand. There is no reason to believe that any nation will yield to logic or idealism unless by so doing it can protect its own interests. The desire of a nation such as ours to extend its unparalleled domestic air transport system to every trade center on earth is highly laudable, but unless we are willing to make substantial compromises we should be prepared for serious difficulties, and shape our aviation policy accordingly.

SEQUELS TO THE CHICAGO AVIATION CONFERENCE

RICHARD KERMIT WALDO*

I. THE CHICAGO AVIATION CONFERENCE PRODUCES SIX IMPORTANT DOCUMENTS

The International Civil Aviation Conference which was held in Chicago from November 1 to December 7, 1944, was called for two basic and closely-related purposes. The first was to work out arrangements whereby international airlines could inaugurate operations as soon as the military situation permitted, thus enabling commercial air transport to assume with the least possible delay its proper functions of providing rapid communication between nations and peoples and of renewing world trade and commerce after the period of stagnation due to World War II. The second purpose was to set up machinery to promote the orderly and healthy development of international civil aviation during the postwar era. With both the immediate and the longer-range problems in view, the Conference, in the course of five weeks of deliberations, produced six important documents prior to its adjournment on December 7, 1944.[1] The success of the Conference is reflected in these documents. Taken together, they trace a rough but encouraging blueprint for world civil aviation.

Five of these documents were drawn up as appendices to the Final Act of the Conference. Appendix I is the Interim Agreement on International Civil Aviation; Appendix II is the Convention on International Civil Aviation; Appendix III is the International Air Services Transit Agreement; Appendix IV is the International Air Transport Agreement; and Appendix V is a set of twelve Draft Technical Annexes, which will ultimately be made a part of the Convention. The sixth doc-

* A.B., 1940, University of Pennsylvania; graduate work in Transportation at The American University, 1944-45. Chief, Research Section, Aviation Division, U. S. Department of State. Formerly air transport analyst for Transcontinental & Western Air, Inc., Pan American Airways, Inc., Board of Economic Warfare and War Production Board, and economic analyst for Department of Commerce. Author of four air cargo studies published in 1944-45 by Edward S. Evans Transportation Research.

[1] For text of documents, see DEPT. OF STATE, INTERNATIONAL CIVIL AVIATION CONFERENCE—FINAL ACT AND RELATED DOCUMENTS (Pub. 2282, Conf. Ser. 64, 1945), hereinafter cited as "FINAL ACT." For a day to day summary of the Conference, see UNITED NATIONS INFORMATION ORGANIZATION, REPORT OF THE CHICAGO CONFERENCE ON INTERNATIONAL CIVIL AVIATION (London, 1945), hereinafter cited as "REPORT." For a general discussion of the Conference, see DEPT. OF STATE, BLUEPRINT FOR WORLD CIVIL AVIATION (Pub. 2348, 1945), hereinafter cited as "BLUEPRINT." This BLUEPRINT reprints the following articles: Berle, *Freedoms of the Air* (March, 1945) 190 HARPER'S MAGAZINE 327; Morgan, *The International Civil Aviation Conference at Chicago: What It Means to the Americas* (Jan. 7, 1945) 12 DEPT. OF STATE BULL. 33; Burden, *Opening the Sky: American Proposals at Chicago* (March, 1945) 175 ATLANTIC MONTHLY 50; Warner, *The Chicago Air Conference: Accomplishments and Unfinished Business* (April, 1945) 23 FOREIGN AFFAIRS 406. See also Walstrom, *The Chicago Air Conference* (Dec. 31, 1944) 11 DEPT. OF STATE BULL. 843.

ument, contained in Recommendation VIII of the Final Act,[2] is the Standard Form of Agreement for Provisional Air Routes.

This article will describe each of these documents in their relative order of importance, and will trace their progress during the ten-month period which followed the Conference, from December 8, 1944 to October 1, 1945. It will also make reference, at the appropriate points, to developments growing out of a number of the recommendations and resolutions of the Final Act, apart from the aforementioned Recommendation VIII. Finally, it will review certain other developments during this ten-month period, which may be considered as direct or indirect sequels to the Chicago Conference.

II. Ratification of the Convention Proceeds Slowly

The most important of the documents drawn up at the Chicago Conference was the International Civil Aviation Convention, which covers the air transport, air navigation and technical phases of aviation, and establishes a basis of common air practice throughout the world.[3] The Convention provides for the establishment of an International Civil Aviation Organization (ICAO) comprising both a Council and an Assembly.[4] All contracting states are represented in the Assembly, while the Council is composed of twenty-one states elected on the basis of their importance in international air transport, or their contribution of air navigation facilities, or their geographical position.

Representatives of fifty-four states attended the Chicago Conference. On December 7, 1944, signatures on behalf of thirty-seven of these states were affixed to the Convention (see Table A, on the next page). As of October 1, 1945, signatures on behalf of twelve other states had been added, for a total of forty-nine. Only Colombia, Ethiopia, Panama, Venezuela and Yugoslavia had not yet signed.

As was anticipated at the Conference, progress on ratification of the Convention has been relatively slow. By October 1, 1945, only the Polish Government-in-Exile had deposited its instrument of ratification with the United States Government, as

[2] FINAL ACT, *supra* note 1, at 40-41. There were 12 recommendations and resolutions in all.

[3] For a specific treatment of the Chicago Convention, see Latchford, *Comparison of the Chicago Aviation Convention with the Paris and Habana Conventions* (1945) 12 DEPT. OF STATE BULL. 411; Colclaser, *The New International Civil Aviation Organization* (1945) 31 VA. L. REV. 457. For a comparison of the Chicago Convention with the Paris and Habana Conventions, article by article, in three-column tabular form, see *Hearings Before the Committee on Foreign Relations (Senate) on Executive A,* 79th Cong., 1st Sess. (1945) 199-252.

[4] It is of interest to note the objectives of the ICAO. They are to:

(a) Insure the safe and orderly growth of international civil aviation throughout the world;

(b) Encourage the development of airways, airports, and air-navigation facilities for international civil aviation;

(c) Encourage the arts of aircraft design and operation for peaceful purposes;

(d) Meet the needs of the peoples of the world for safe, regular, efficient, and economic air transport;

(e) Prevent economic waste caused by uneconomic competition;

(f) Insure that the rights of contracting states are fully respected and that every contracting state has a fair opportunity to operate international airlines;

(g) Avoid discrimination between contracting states;

(h) Promote safety of flight in international air navigation; and

(i) Promote generally the development of all aspects of international civil aeronautics.

STATUS ON DECEMBER 10, 1945, OF CIVIL AVIATION DOCUMENTS CONCLUDED AT CHICAGO, DECEMBER 7, 1944

TABLE A: DATES OF SIGNATURES*

Country	Convention	Interim Agreement	Transit Agreement (Two Freedoms)	Transport Agreement (Five Freedoms)
Afghanistan	X	X	X	X
Australia	X	X	7/ 4/45	.....
Belgium	4/ 9/45	4/ 9/45	4/ 9/45	.....
Bolivia	X	X	X	X
Brazil	5/29/45	5/29/45	.....	.....
Canada	X	X	2/10/45	.....
Chile	X	X	X	.....
China	X	X	.....	X
Colombia	.....	5/24/45	.....	.....
Costa Rica	3/10/45	3/10/45	3/10/45	3/10/45
Cuba	4/20/45	4/20/45	4/20/45	4/20/45
Czechoslovakia	4/18/45	4/18/45	4/18/45	.....
Dominican Republic	X	X	.....	X
Ecuador	X	X	X	X
Egypt	X	X	X	.....
El Salvador	5/ 9/45	5/ 9/45	5/ 9/45	5/ 9/45
Ethiopia	.....	3/22/45	3/22/45	3/22/45
France	X	X	X	.....
Greece	X	X	X	.....
Guatemala	1/30/45	1/30/45	1/30/45	1/30/45
Haiti	X	X	X	X
Honduras	X	X	X	X
Iceland	X	X	4/ 4/45	4/ 4/45
India	X	X	X	.....
Iran	X	X	X	.....
Iraq	X	X	X	.....
Ireland	X	X	.....	.....
Lebanon	X	X	X	X (c)
Liberia	X	X	X	X
Luxembourg	7/ 9/45	7/ 9/45	7/ 9/45	.....
Mexico	X	X	X	X
Netherlands	X	X	X	X (a)
New Zealand	X	X	X	.....
Nicaragua	X	X	X	X
Norway	1/30/45	1/30/45	1/30/45	.....
Panama	.....	5/14/45	.....	.....
Paraguay	7/27/45	7/27/45	7/27/45	7/27/45
Peru	X	X	X	X
Philippine Comm.	X	X	X	.....
Poland	X	X	X	.....
Portugal	X	X	.....	.....
Spain	X	X	X	.....
Sweden	X	X	X	X
Switzerland	7/ 6/45	X	7/ 6/45	.....
Syria	X	X	7/ 6/45	7/ 6/45 (a)
Turkey	X	X	X	X (a)
Union of S. Africa	6/ 4/45	6/ 4/45	6/ 4/45	.....
United Kingdom	X	X	X (b)	.....
United States	X	X	X	X
Uruguay	X	X	X	X
Venezuela	.....	X (c)	X (c)	X (c)
Yugoslavia	.....	.....	.....	.....
Danish Minister	X	X	X	X
Thai Minister	X	X	X	X

* X indicates signatures under date of December 7, 1944. (a) Reservation. (b) Reservation excluding Newfoundland withdrawn by United Kingdom 2/7/45. (c) Ad referendum.

TABLE B: DATES OF ACCEPTANCES OF AGREEMENTS AND OF DEPOSITS OF RATIFICATIONS OF CONVENTION

Country	Convention	Interim	Transit	Transport
Afghanistan	.....	5/16/45	5/16/45	5/16/45
Australia*	.....	5/19/45	8/27/45	.....
Belgium*	.....	4/17/45	7/18/45	.....
Bolivia	.....	.....	.....	.....
Brazil*	.....	5/29/45	.....	.....
Canada*	.....	12/30/44	2/10/45	.....
Chile*	.....	6/ 4/45	.....	.....
China*	.....	6/ 6/45	.....	6/ 6/45 (a)
Colombia*	.....	6/ 6/45	.....	.....
Costa Rica	.....	.....	.....	.....
Cuba	.....	.....	.....	.....
Czechoslovakia*	.....	4/18/45	4/18/45	.....
Dominican Republic	.....	.....	.....	.....
Ecuador	.....	.....	.....	.....
Egypt*	.....	4/26/45	.....	.....
El Salvador*	.....	5/31/45	5/31/45	5/31/45
Ethiopia	.....	3/22/45	3/22/45	3/22/45
France*	.....	6/ 5/45	.....	.....
Greece	.....	9/21/45	7/ 9/45	.....
Guatemala	.....	.....	.....	.....
Haiti	.....	6/ 2/45	.....	.....
Honduras	.....	11/13/45	.....	.....
Iceland	.....	6/ 4/45	11/ 8/45	11/ 8/45
India*	.....	5/ 1/45 (b)	5/ 1/45 (b)	.....
Iran	.....	.....	.....	.....
Iraq*	.....	6/ 4/45	6/14/45	.....
Ireland	.....	4/27/45	.....	.....
Lebanon	.....	6/ 4/45	.....	.....
Liberia	.....	3/17/45	3/17/45	3/17/45
Luxembourg	.....	7/ 9/45	.....	.....
Mexico*	.....	5/22/45	.....	.....
Netherlands*	.....	1/11/45	1/11/45	1/11/45 (c)
New Zealand	.....	4/18/45 (b)	4/18/45 (b)	.....
Nicaragua	.....	.....	.....	.....
Norway*	.....	1/30/45	1/30/45	.....
Panama	.....	.....	.....	.....
Paraguay	.....	7/27/45	7/27/45	7/27/45
Peru	.....	5/ 4/45	.....	.....
Philippine Comm.	.....	.....	.....	.....
Poland	4/ 6/45	4/ 6/45	4/ 6/45	.....
Portugal	.....	5/29/45	.....	.....
Spain	.....	7/30/45	7/27/45	.....
Sweden	.....	7/ 9/45	11/16/45	11/16/45
Switzerland	.....	7/ 6/45	7/ 6/45	.....
Syria	.....	7/ 6/45	.....	.....
Turkey*	.....	6/ 6/45	6/ 6/45	6/ 6/45 (d)
Union of S. Africa	.....	11/30/45	11/29/45	.....
United Kingdom*	.....	5/31/45 (b)	5/31/45 (b)	.....
United States*	.....	2/ 8/45	2/ 8/45 (e)	2/ 8/45 (e)
Uruguay	.....	.....	.....	.....
Venezuela	.....	.....	.....	.....
Yugoslavia	.....	.....	.....	.....
Danish Minister	.....	11/13/45	.....	.....
Thai Minister	.....	.....	.....	.....

*Elected to First Interim Council. (a) Provisions of Art. IV, Sec. 3, become operative when Convention is ratified. (b) Reservation: Do not regard Denmark and Thailand (Siam) as being parties. (c) Reservation respecting 5th Freedom, withdrawn 9/21/45. (d) Reservation respecting 5th Freedom. (e) With reservation.

provided in the Convention. However, it is expected that the Convention will have been ratified by the necessary twenty-six states well within the three-year maximum term of the Interim Agreement.

President Roosevelt transmitted the Convention to the United States Senate on March 12, 1945, with a view to receiving its advice and consent to ratification as a treaty. Shortly thereafter, representatives of the State, War, Navy and Commerce Departments, as well as of the Civil Aeronautics Board testified on behalf of the Convention before a Subcommittee of the Senate Committee on Foreign Relations. No adverse testimony on the Convention was taken. No further move had been made by the Subcommittee as of October 1, 1945, except to publish a verbatim account of the Hearings.[5]

III. THE INTERIM AGREEMENT COMES INTO FORCE IN JUNE, 1945

Because it was anticipated that it would take a substantial period of time for the necessary twenty-six states to ratify or adhere to the Convention, the Interim Agreement on International Civil Aviation was drawn up. It was believed that this could be brought into force at a relatively early date by the simpler legal process of acceptance by the same number of states. This Interim Agreement contains many of the basic provisions of the Convention, but it is more limited in scope and less detailed than the latter document. The Interim Agreement provides for the establishment of a Provisional International Civil Aviation Organization (PICAO) with an Interim Assembly and an Interim Council.

The Interim Agreement was signed on December 7, 1944, by representatives of thirty-nine states (see Table A, above). As of December 10, 1945, signatures on behalf of fourteen more had been affixed, and only the signature of Yugoslavia was missing of all the states represented at the Conference.

It was provided in the Agreement that each government would inform the Government of the United States at the earliest possible date whether signature on its behalf constituted an acceptance of the Agreement by that government and an obligation binding upon it. The Agreement was to come into force upon its acceptance by the twenty-sixth state. It was further provided that each state elected at Chicago to the first Interim Council had to accept the Agreement within six months after December 7, 1944, to retain its Council seat.

By June 6, 1945, all twenty of the council member states had accepted the Interim Agreement,[6] as had ten additional states (see Table B, above). The twenty-sixth acceptance was thus achieved and surpassed, so the Interim Agreement came into force on June 6, and PICAO was activated.

The following twenty council member states thus became members of PICAO: Australia, Belgium, Brazil, Canada, Chile, China, Colombia, Czechoslovakia, Egypt,

[5] See *Hearings, supra* note 3.

[6] Although a twenty-one member Council was provided for by the Interim Agreement, only twenty seats were filled. A vacant seat was left for the Soviet Union, should that state decide later to join the organization.

El Salvador, France, India, Iraq, Mexico, the Netherlands, Norway, Peru, Turkey, the United Kingdom and the United States.[7] The following ten non-council member states also became members of the new organization upon its activation: Afghanistan, Ethiopia, Haiti, Iceland, Ireland, Lebanon, Liberia, New Zealand, Poland and Portugal.

Shortly after June 6, the Canadian Government (acting as host, since Montreal had been chosen as the seat of PICAO) invited the twenty council member states to designate their Representatives on the Interim Council and to send them to Montreal for the opening sessions, beginning August 15, 1945.

Between June 6 and August 15, 1945, six more states, including Luxembourg, Paraguay, Spain, Sweden, Switzerland and Syria accepted the Interim Agreement, making a total PICAO membership of thirty-six states. By December 10, 1945, Greece, Honduras, Union of South Africa and Denmark had also joined.

IV. The Chicago Technical Annexes Are Improved Upon

Substantial progress was made during the months following the Conference in revising the Chicago annexes. It will be recalled that Appendix V of the Final Act of the Conference is a set of twelve draft technical annexes, which will ultimately become a part of the Convention, covering such subjects as Communications Procedures & Systems, Rules of the Air, and Aeronautical Maps & Charts.[8] It should be noted that these annexes, even when they are incorporated into the Convention, will not be absolutely binding on the member states. They will be international standards or recommended practices, but deviations will be permitted. It is hoped and expected, however, that these standards and practices will be voluntarily adopted on a world-wide scale. If this is done, international civil aviation will be immensely benefited by the fact that aircraft flying to all parts of the world will comply with the same standards, follow the same procedures, give and recognize the same signals everywhere.

Resolution II of the Final Act of the Conference pointed out that the greatest possible degree of international standardization of practice in many aeronautical matters was important to safe and expeditious air navigation and recalled the progress made in this connection during the Conference. The resolution provided that the twelve technical annexes were to be accepted by the participating states for immediate and continuing study, and that these states should forward to the United States Government by May 1, 1945, any recommendations which they might have for necessary additions, deletions, or amendments. The United States Government,

[7] The United States accepted the agreement as an Executive Agreement, on February 8, 1945. It was the fourth state to accept.

[8] The complete list of draft technical annexes is as follows: (A) Airways Systems; (B) Communications Procedures and Systems; (C) Rules of the Air; (D) Air Traffic Control Practices; (E) Standards Governing the Licensing of Operating and Mechanical Personnel; (F) Log Book Requirements; (G) Airworthiness Requirements for Civil Aircraft Engaged in International Air Navigation; (H) Aircraft Registration and Identification Marks; (I) Meteorological Protection of International Aeronautics; (J) Aeronautical Maps and Charts; (K) Customs Procedures and Manifests; and (L) Search and Rescue, and Investigation of Accidents.

for its part, was to transmit such suggestions to all other participating states (and of course to formulate and circulate its own suggestions). Thus, much groundwork was to be laid for the technical subcommittees of PICAO, which would be charged with the preparation of the annexes in final form for attachment to the Convention.

Within the United States Government, a number of technical working groups were established, on which all interested agencies were represented, to consider amendments to the draft annexes. By the date of the first session of the Interim Council, the United States Government had received recommendations for modification of one or more annexes from seven states and had formulated its own recommendations. Five other states indicated that they would have no changes to suggest. It is likely that there would have been a larger number of comments if the International Commission for Air Navigation[9] had not taken the Chicago texts under consideration in connection with the revision of the annexes to the Paris Convention. Several of the members of that organization, including the United Kingdom and France, accordingly reserved any expression on the Chicago annexes until final conclusions had been reached by the Commission on the Paris Convention Annexes. Although the Commission had taken no final action before the opening sessions of the PICAO Interim Council, it made available to PICAO the conclusions of the CINA Operational Subcommittee upon the further development of the annexes to its own Convention, reached after study of the Chicago proposals. In review, it was found that although many important suggestions were made by various states and the CINA Subcommittee concerning the PICAO draft annexes, in very few cases were they so broad as to require reconsideration of the basic principles of the existing Chicago texts. It was decided that all of the annexes drawn up at Chicago, with the exception of two which required certain secretarial work, were ready for immediate submission to the appropriate technical subcommittees of PICAO. It was also decided that the Chicago annexes dealing with standards of airways organization and operation were the most urgent.[10] Work on these particular annexes, therefore, was subsequently given top priority by PICAO in scheduling the meetings of its technical subcommittees, thus furthering one of the two basic purposes of the Chicago Conference, that of expediting the early inauguration of commercial services.

In addition to the progress made on the draft technical annexes during the months preceding the first sessions of the Interim Council, a considerable amount of PICAO groundwork was done, particularly in the period following June 6, 1945, by a highly competent group known as the Canadian Preparatory Committee. Com-

[9] This organization, commonly referred to as CINA, after its initials in French, was established under Article 34 of the International Convention Relating to the Regulation of Aerial Navigation signed at Paris on October 13, 1919. CINA had a number of functions in the preparation of technical regulations for air navigation comparable to those of ICAO, which will replace CINA when the Chicago Convention comes into force. Unlike ICAO, CINA was not empowered to conduct extensive studies in the economic or air transport field.

[10] These included the draft annexes on Airways Systems, Communications Procedures and Systems, Rules of the Air, Air Traffic Control Practices, and Meteorological Protection of International Aeronautics.

posed of technicians on loan from the Canadian armed services and Government, it handled the physical arrangements for the opening sessions of the Council, as well as preparing and documenting a broad twenty-nine item agenda for the sessions.

V. THE INTERIM COUNCIL OF PICAO MEETS IN AUGUST

After several days of preliminary informal discussions, Representatives of nineteen of the twenty council member states opened the first session of the Interim Council in Montreal on August 15, 1945. Mexico was the only member state not represented. The calibre of the men designated as Representatives augured well for the Council's success.[11]

The Council held nine meetings. After election of officers[12] and other organizational steps, the Council divided its membership into three *ad hoc* committees to consider, respectively, the general agenda topics relating to Organization, Personnel, and Finance. Later, a fourth committee, on Procedure, was appointed, to formulate a plan for constituting the three main Committees of the Council provided for in the Interim Agreement, as well as establishing subcommittees thereof, and scheduling near-future meetings. The proposals of these four *ad hoc* committees were discussed and adopted, with amendments, at subsequent meetings of the Council.

A simplified organization chart of PICAO is shown below (see Figure A, next page). The main divisions of the organization are the Interim Assembly, the Interim Council and its three main committees, the President's office and the Secretariat. Each member state of PICAO, whether or not a council member, is entitled to representation on all committees and subcommittees of the Council. The Secretariat is to be recruited on an international basis.

The main duties of the Assembly[13] are to approve PICAO's budget and financial arrangements, to refer specific matters to the Council for its consideration and report, to take appropriate action upon the reports of the Council, and to decide upon matters referred to it by the Council.

The chief functions of the Council,[14] in addition to submitting budget estimates to the Assembly, carrying out the Assembly's directives, and exercising powers which the Assembly may delegate to it, are to:

"1. Maintain liaison with the member States of the (PICAO) Organization, calling upon them for such pertinent data and information as may be required in giving consideration to recommendations made by them.

"2. Receive, register, and hold open to inspection by member States all existing contracts and agreements relating to routes, services, landing rights, airport facilities, or other

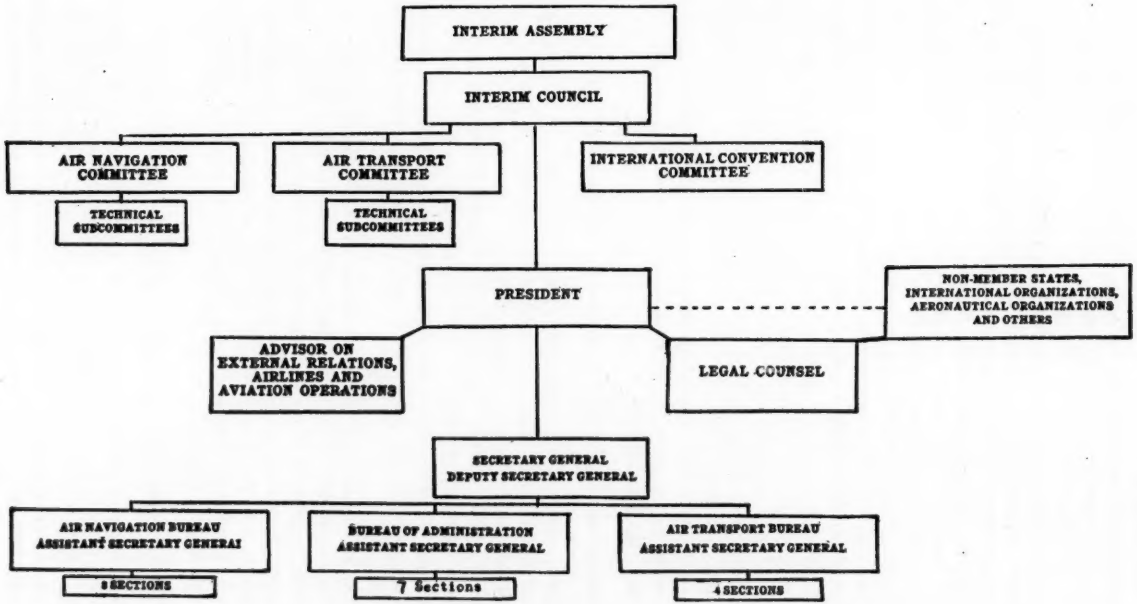
[11] The Untied States representative was Dr. Edward P. Warner, then Vice-Chairman of the Civil Aeronautics Board.

[12] Dr. Edward P. Warner, *supra* note 11, was elected President, and Mr. Gerald Brophy, a prominent aviation attorney, succeeded him as United States Representative. Dr. Albert Roper of France was elected Secretary-General of PICAO.

[13] The Assembly's powers and duties are set forth in Art. 2, Sec. 2 of the Interim Agreement, FINAL ACT *supra* note 1, at 45; PICAO, DOCUMENT 64.

[14] Set forth in Art. III, Secs. 5 and 6 of the Interim Agreement, FINAL ACT *supra* note 1 at 47-49; PICAO, DOCUMENT 64.

FIGURE A. SIMPLIFIED ORGANIZATION CHART OF THE PROVISIONAL INTERNATIONAL CIVIL AVIATION ORGANIZATION



international air matters to which any member State or any airline of a member State is a party.

"3. Supervise and coordinate the work of:
   a. The Committee on Air Transport
   b. The Committee on Air Navigation.
   c. The Committee on International Convention on Civil Aviation.

"4. Receive and consider the reports of the committees and working groups.

"5. Transmit to each member State the reports of these committees and working groups and the findings of the Council thereon.

"6. Make recommendations with respect to technical matters to the member States of the Assembly individually or collectively.

"7. Submit an annual report to the Assembly.

"8. When expressly requested by all the parties concerned, act as an arbitral body on any differences arising among member States relating to international civil aviation matters which may be submitted to it. The Council may render an advisory report or if the parties concerned so expressly decide, they may obligate themselves in advance to accept the decision of the Council. The procedure to govern the arbitral proceedings shall be determined in agreement between the Council and all the interested parties.

"9. On direction of the Assembly, convene another conference on international civil aviation; or at such time as the Convention is ratified, convene the first Assembly under the Convention."

The leading functions of the Committee on Air Transport[15] are to:

"a. Observe, correlate, and continuously report upon the facts concerning the origin and volume of international air traffic and the relation of such traffic, or the demand therefor, to the facilities actually provided.

"b. Request, collect, analyze and report on information with respect to subsidies, tariffs, and costs of operation.

"c. Study any matters affecting the organization and operation of international air services, including the international ownership and operation of international trunk lines.

"d. Study and report with recommendations to the Assembly as soon as practicable on the matters on which it has not been possible to reach agreement among the nations represented at the International Civil Aviation Conference, convened in Chicago, November 1, 1944, in particular the matters comprehended within the headings of Articles II, X, XI, and XII of Conference Document 422, together with Conference Documents 384, 385, 400, 407, and 429, and all other documentation relating thereto."

The chief functions of the Committee on Air Navigation[16] are to:

"a. Study, interpret and advise on standards and procedures with respect to communications systems and air navigation aids, including ground marks; rules of the air and air traffic control practices; standards governing the licensing of operating and mechanical personnel; airworthiness of aircraft; registration and identification of aircraft; meteorological protection of international aeronautics; log books and manifests; aeronautical maps and charts; airports; customs, immigration, and quarantine procedure; accident investigation, including search and salvage; and the further

[15] *Ibid.* [16] *Ibid.*

unification of numbering and systems of dimensioning and specification of dimensions used in connection with international air navigation.

"b. Recommend the adoption, and take all possible steps to secure the application, of minimum requirements and standard procedures with respect to the subjects in the preceding paragraph.

"c. Continue the preparation of technical documents, in accordance with the recommendations of the International Civil Aviation Conference approved at Chicago on December 7, 1944, and with the resulting suggestions of the member States, for attachment to the Convention on International Civil Aviation, signed at Chicago on December 7, 1944."

The functions of the Committee on International Convention on Civil Aviation[17] are "to continue the study of an international convention on civil aviation."

The President,[18] in addition to the usual duties of such an office, has special responsibilities as an arbitrator of disputes arising among the member states under the Interim Agreement. He is also responsible for the relationship of PICAO to the member states, non-member states, and other international and aeronautical organizations. To assist him in the discharge of these latter responsibilities is the primary function of his Advisor on External Relations, Airlines and Aviation Operations; this official also directs PICAO's press and public relations program. On all legal problems of drafting, interpretation, etc., the President is advised by his Legal Counsel.

The Secretary-General is the chief executive and administrative official, responsible to the President as the representative of the Council. He supervises and directs the work of the Secretariat.[19]

The Secretariat is divided into the Air Navigation Bureau,[20] the Air Transport Bureau[21] and the Bureau of Administration.[22] The first two bureaux are set up largely to service the Air Navigation and Air Transport Committees of the Council, respectively, and their subcommittees, studying and making recommendations on matters in their respective fields. The Bureau of Administration will service the entire PICAO organization on such matters as personnel, office services, publications, and library facilities.

The Council adopted a Schedule of Personnel by Grade and Organizational Unit,[23] which provided for 155 positions, of which 35 are classified as senior personnel, 40 as other key personnel, and 80 as clerks and stenographers. It also

[17] *Ibid.*

[18] See Interim Agreement, Art III, Sec. 3, *op. cit. supra* note 14.

[19] See PICAO, DOCUMENT 64, for further detail on functions of the President, his two advisors and the Secretary-General.

[20] This bureau is divided into the following eight sections: Airworthiness, Personnel Licensing, Landing Areas & Ground Aids, Rules of the Air & Air Traffic Control, Communications, Meteorological, Aeronautical Maps & Charts, and Search and Rescue & Accident Investigation. For detailed functions of each, see PICAO, DOCUMENT 42.

[21] This bureau is divided into the following four sections: Operational Studies, Economic Studies, Statistical Studies, and Legal Studies. For functions, see PICAO, DOCUMENT 44.

[22] This bureau is divided into the following seven sections: Organization & Finance, Staff, Library, Publications and Documents, Conference, Office Services and Registry. For functions, see PICAO, DOCUMENT 43.

[23] See PICAO, DOCUMENT 65, approved at the eighth Council meeting, August 29, 1945.

adopted Staff Regulations, Travel Regulations, a Salary Scale in Canadian Dollars, a Budget for the Period June 6, 1945-July 1, 1946, a Scale of Advances and Amounts of Advances Applied to the Budget, and a set of Financial Regulations for the Council.[24] The proposed budget totals $997,180 (Canadian). The scale of advances is on the basis of 251 units, allocated between 36 member states. Thirty units apiece are prescribed for the United States and the United Kingdom, or $119,160 (Canadian) each. Fifteen units each are prescribed for Canada, China, and France, with 10 each for Australia, Brazil, India, and the Netherlands. Seven other countries are given 8 units apiece; 3 countries, 5 units; 9 countries, 3 units; and 8 countries, a single unit each. Rules of Procedure for the Interim Council were adopted, as well as Rules of Procedure for the Committees and Subcommittees of the Council.[25]

The Council decided to schedule the first meetings of the Air Navigation Committee and the Air Transport Committee on October 2 and 3, 1945, respectively. It also scheduled the first meetings of eight technical subcommittees of the Air Navigation Committee during the months of October and November.[26] It was agreed that a temporary Secretariat would be established, pending the recruitment of a permanent Secretariat, by borrowing personnel from the member states.

The Council considered items 16 to 29 of the Canadian Preparatory Committee Agenda, and referred seven of the items to the Air Navigation Committee and six to the Air Transport Committee, to form the basis of an agenda for their opening meetings.

The following items were referred to the Air Navigation Committee:

(1) Problems of airways organization, and promotion of uniformity of air navigation facilities, universal provision of landing areas, meteorological organization, communication and air traffic control at least to some minimum standards.
(2) Plans for compilation of lists of airports and air navigation facilities available for use in international air navigation.
(3) Development of a general publication policy for PICAO.
(4) Planning of other special studies in air transport, including those relating to the organization and operation of international air services.
(5) Consideration of need for regional organizations within the framework of PICAO to deal with problems peculiar to particular areas.
(6) Preparation of studies on unification of numbers and systems of dimension in international air navigation.
(7) Consideration of the degree and nature of the assistance to be rendered by PICAO to the member states under the provisions of Article XI of the Interim Agreement.[27]

[24] See PICAO, DOCUMENTS 66, 67, 72, 68, 69 and 70 respectively, all approved at the eighth Council meeting.

[25] See PICAO, DOCUMENTS 85 and 84, respectively, approved at the ninth Council meeting, on August 30, 1945.

[26] These meetings were scheduled as follows: Airways Systems, Landing Areas and Ground Aids—October 8; Meteorological—October 11; Rules of the Air & Air Traffic Control—October 15; Communications—October 18; Personnel Licensing—November 5; Airline Operating Practises—November 7; Aeronautical Maps & Charts—November 12; Search and Rescue & Accident Investigation—November 14.

[27] Under this Article, where a member state desires assistance in the provision of airports or air navigation facilities in its territory, the Council may make arrangements for such assistance under certain conditions.

These items were referred to the Air Transport Committee:

(1) Consideration of the procedure to be adopted by the Council for handling of—
  (a) arbitral proceedings; or
  (b) complaints of excessive airport charges; or
  (c) complaints of "action causing injustice or hardship" under the Transit Agreement or the Transport Agreement.
(2) Resumption of studies on the development of a multilateral agreement relating to commercial rights in international air transportation.[28]
(3) Same as No. 3 under Air Navigation Committee.
(4) Same as No. 4 under Air Navigation Committee.
(5) Same as No. 5 under Air Navigation Committee.
(6) Consideration of relations with CINA,[29] CITEJA,[30] and other international organizations.

Finally, the Council passed resolutions granting legal capacity to the Secretary-General, authorizing him to conduct banking transactions, to acquire and occupy premises, to appoint an auditor, and to publish a PICAO Journal. Then the Interim Council of PICAO, the first functional organization of the United Nations to get under way, ended its initial series of meetings on August 30, to reconvene on October 15, 1945. Although no definite date was set for the initial session of the Assembly, it was expected to be held early in 1946, at which time it would pass upon recommendations formulated up to that time by the Council, as well as upon the budget of PICAO. It may be noted in passing that the Interim Council will remain in substantially continuous session, with occasional recesses, whereas the Assembly will meet only annually.

VI. THE "TWO FREEDOMS" AGREEMENT IS WIDELY ACCEPTED

There is no provision in either the permanent Convention or the Interim Agreement for a multilateral grant of commercial transit or traffic rights for scheduled airlines, because of the inability of the Chicago Conference to reach agreement as to the terms of such a grant. Instead, two separate and optional documents were drawn up.

[28] Resolution X of the Final Act of the Chicago Conference provided that the matters on which it had not been possible to reach agreement at Chicago should be referred to the Interim Council, with instructions to give these matters continuing study and to submit a report thereon to the Assembly as soon as practicable. These were the so-called "disputed articles," the most contentious point therein being the terms upon which full "Five Freedoms" rights should be granted on a multilateral basis.

[29] See *supra* note 9, p. 615.

[30] The International Technical Committee of Aerial Legal Experts, known as CITEJA, after its initials in French, was an outgrowth of the First International Conference of Private Air Law held in Paris in 1925. It has made considerable progress in the development of a code of private international air law through the preparation of draft international conventions for final adoption at periodic international conferences on private air law. Resolution VII of the Final Act of the Chicago Conference urged the completion of pending CITEJA projects and the initiation of new studies in the field of private law. It suggested the early resumption of CITEJA meetings and coordination of CITEJA's efforts with those of PICAO (and ICAO). For further information on CITEJA, see three articles by Stephen Latchford: *Private International Air Law* (Jan. 7, 1945) 12 DEPT. OF STATE BULL. 11; *Coordination of CITEJA with the New International Civil Aviation Organizations* (Feb. 25, 1945) 12 DEPT. OF STATE BULL. 310; *The Growth of Private International Air Law* (1945) 13 GEO. WASH. L. REV. 276.

Under the terms of the first of these documents, the International Air Services Transit Agreement (familiarly known as the "Two Freedoms" Agreement), each nation accepting the Agreement grants to the others accepting it the following rights with respect to scheduled international air services:

(1) The privilege to fly across its territory without landing, and
(2) The privilege to land for non-traffic purposes (refueling, repairs, etc.).

The "Two Freedoms" Agreement was signed on December 7, 1944, by the representatives of thirty states (see Table A, above). As of December 10, 1945, the signatures of sixteen more had been affixed, making a total of forty-six states out of the fifty-four attending the Conference. The Agreement provided that any state a member of ICAO (or PICAO) might accept the Agreement as a binding obligation, by notification of its acceptance to the Government of the United States, and that such acceptance should become effective upon the date of the receipt of such notification. The Agreement was to come into force as between contracting states upon its acceptance by each of them. Thereafter, it was to become binding as to each other state indicating its acceptance to the Government of the United States on the date of the receipt of the acceptance by that Government. The United States was to inform all signatory and accepting states of the date of all acceptances of the Agreement and of the date on which it came into force for each accepting state. The presence in the Agreement of the qualifying words "a member of ICAO (or PICAO)" led to the view on the part of some authorities that the Agreement did not actually come into force as between accepting states until the Interim Agreement had come into force and the states in question had thus become members of PICAO.[31] This is now an academic question, inasmuch as the Interim Agreement came into force on June 6, 1945.

As of December 10, 1945, the Agreement had been accepted by twenty-four of the forty-six signatory states (see Table B, above). This is quite encouraging when it is considered that these twenty-four include such states important to international civil aviation as three of the great colonial powers: the United Kingdom, the Netherlands and Belgium; and twenty-one other strategically located countries: the United States, Canada, Spain, Norway, Sweden, Poland, Czechoslovakia, Switzerland, Greece, Turkey, Liberia, Union of South Africa, Ethiopia, Iraq, Afghanistan, India, Australia, New Zealand, El Salvador, Honduras and Paraguay. In summary, a large portion of the world's air is now open on a multilateral basis for the first time to international civil airlines for the purpose of transit and technical stop. This represents a real advance over the situation which obtained prior to the Chicago Conference. Looking to the future, there are grounds for optimism, since more and more states are showing signs of willingness to accept the "Two Freedoms" Agreement. If the wide acceptance of this Agreement continues apace, a multilateral grant of the "Two Freedoms" Agreement may ultimately be written into the permanent Convention.

[31] The same provisions as to acceptances and coming into force obtain for the "Five Freedoms" Agreement discussed in the next main heading, *infra*.

VII. ACCEPTANCE OF THE "FIVE FREEDOMS" AGREEMENT IS LIMITED

The second of the optional documents, the International Air Transport Agreement (known as the "Five Freedoms" Agreement) consists of a mutual interchange of not only the aforementioned privileges of transit and non-traffic stop but also the following three traffic privileges:

(3) The privilege to put down passengers, mail and cargo taken on in the territory of the state whose nationality the aircraft possesses.
(4) The privilege to take on passengers, mail and cargo destined for the territory of the state whose nationality the aircraft possesses, and
(5) The privilege to take on passengers, mail and cargo destined for the territory of any other contracting state, and the privilege to put down passengers, mail and cargo coming from any such state.

The "Fifth Freedom," the right of a through international airline to carry country-to-country traffic along its route, beginning with the first country it touches after leaving its homeland, was the most contentious point of the Chicago Conference.

First, agreement was lacking as to whether to include the "Fifth Freedom" in a multilateral grant of commercial rights in the Convention. The United States favored its inclusion, reasoning that unless intermediate traffic were available to fill the empty seats left by debarking passengers, an airliner on a long international route would approach its terminus with a steadily decreasing number of full seats. Under such conditions, economic operations would not be possible. The United Kingdom first opposed the inclusion of the "Fifth Freedom" arguing that local and regional airlines would lose much country-to-country traffic to the large international through airlines.

Later, when the United Kingdom tentatively agreed to include it in the Convention, its Delegation could not agree with the United States' position that, if schedule frequencies were to be controlled by international agreement, "Fifth Freedom" traffic should be counted in determining at what point an airline should be permitted to increase its schedules over a given international route. Hence, the two separate and optional documents were drawn up.

The "Five Freedoms" Agreement was signed at the conclusion of the Chicago Conference by representatives of twenty states (see Table A, above). As of October 1, 1945, signatures on behalf of eight more had been affixed. If these twenty-eight signatory states had followed up their signatures with acceptances of the Agreement, international airlines would enjoy in a very large block of the world's air not only the rights of transit and technical stop but also the more important three commercial rights included in the third, fourth and fifth freedoms. As of October 1, 1945, however, only nine of the twenty-eight signatory states had accepted the "Five Freedoms" Agreement as a binding obligation. Although these nine countries include such strategic ones as the United States, the Netherlands, Turkey, Liberia, Ethiopia, Afghanistan, China, El Salvador and Paraguay, it is clear that many bi-

lateral air transport agreements will still be needed to supplement the "Five Freedoms" Agreement before international air lines can inaugurate economically-sound long-distance services.

VIII. New Bilateral Agreements Follow the Chicago Standard Form

Resolution VIII of the Final Act of the Chicago Conference recommended a "Form of Standard Agreement for Provisional Air Routes," which it was hoped would be followed in concluding future bilateral agreements. Such a form was drawn up in recognition of the fact that certain countries which would not feel able in the near future to grant air rights on a multilateral basis by acceptance of the Transit or Transport Agreements, would nevertheless desire to enter into some bilateral air transport agreements in order to get their international airlines into operation. The standard form of agreement does away with the practices of exclusivity and discrimination against third-party-nations which have been characteristic of some past bilateral agreements. Deviations of wording from the standard form are of course to be permitted, but it is believed that if the basic principles of the form are incorporated into future bilateral agreements, considerable progress will have been made in clearing the path for a multilateral grant of commercial air freedoms on a world-wide scale.

The United States had concluded, as of December 10, 1945, bilateral air transport agreements with eight countries which in general follow the Chicago standard form. The countries and the effective dates of the agreements are as follows:

Spain—December 2, 1944	Ireland—February 17, 1945
Denmark—January 1, 1945	Switzerland—August 3, 1945
Sweden—January 1, 1945	Norway—October 15, 1945
Iceland—February 1, 1945	Portugal—December 6, 1945

In each of these agreements, full and unlimited "Five Freedoms" rights were exchanged.[32]

A bilateral agreement was also concluded with Canada, effective on February 17, 1945, which did not follow the Chicago form, due to the peculiar conditions existing between the United States and Canada, as contiguous countries. In this agreement, "Four Freedoms" rights were exchanged.[33]

IX. There Have Been Other Sequels to the Chicago Conference

In addition to developments growing out of the six documents of the Chicago Conference, i.e., the Convention, Interim Agreement, Technical Annexes, Transit Agreement, Transport Agreement and the Standard Form of Route Agreement,

[32] For the text of these agreements see DEPT. OF STATE, EXECUTIVE AGREEMENT SERIES No. 432 (with Spain, 1945); *id.* No. 431 (with Sweden, 1945); *id.* No. 430 (with Denmark, 1945). For agreements with the other countries see Dept. of State, Press Release No. 75 (with Iceland, Jan. 30, 1945); *id.* No. 84 (with Ireland, Feb. 3, 1945); *id.* No. 587 (with Switzerland, Aug. 4, 1945); *id.* No. 736 (with Norway, Oct. 6, 1945); *id.* No. 920 (with Portugal, Dec. 7, 1945).

[33] For text, see DEPT. OF STATE, EXECUTIVE AGREEMENT SERIES No. 457 (1945).

there have been a number of other interesting and important developments which may also be described, to a greater or lesser degree, as sequels to the Conference. Some of them may be considered more as sequels in time than in effect. The Conference necessarily influenced all of these developments to a certain degree. One of these, the organization of the International Air Transport Association (IATA) has been on the non-governmental level, the remainder on the governmental level.

A logical sequel to the organization of such an inter-governmental body as PICAO was the establishment of a world-wide association of airline operators to handle problems such as rates, ticketing, and advertising with which PICAO does not plan to deal, and to cooperate with PICAO in a number of other phases of international air transport. The International Air Transport Association was formally organized on April 19, 1945, at a three-day operators' conference in Habana. Preliminary meetings had been held in Washington shortly after the Chicago Conference. Representatives of 41 international airlines from 25 nations signed the articles of organization. As of October 1, 1945, the membership had grown to some 60 airlines. The Association, like PICAO, has its seat in Montreal, and scheduled its first general meeting for October 15, 1945. IATA has a nine-man Executive Committee headed by Mr. John Cooper of Pan American Airways.[34] The Committee held its first meeting in Paris from July 30 to August 2, 1945. The presidency of the association, an honorary position, is held by Mr. H. J. Symington, of Trans-Canada Airlines. Prior to the October 15th general meeting, IATA was expected to absorb a predecessor organization with the same initials, the International Air Traffic Association. The older IATA, which functioned from 1919 to 1939 had its headquarters at The Hague, and was primarily a European organization, whereas the new IATA is world-wide.

On the governmental level, the United Kingdom, perhaps as a result of its failure to achieve the adoption of certain of its views at the Chicago Conference, sponsored the establishment of a Commonwealth Air Transport Council, shortly after the conclusion of that Conference. The Council, which is of a consultative character, will discuss matters affecting civil aviation of common concern to the units of the British Commonwealth. It will have a permanent Secretariat, and will meet as required in different parts of the Commonwealth. All members of the British Commonwealth are represented on the Council.[35] A general meeting of the Council was held in London during July, 1945, to discuss the pooling of revenues, expenses, and aircraft on parallel routes throughout the Empire operated by British and Dominion companies. Agreement along these lines was worked out between the United Kingdom and the Union of South Africa, India, Australia, and New Zealand. Canada, however, declined to pool operations and revenues on a 50-50 basis, on routes between

[34] Mr. Cooper addressed the Interim Council of PICAO at its seventh meeting, on August 28, 1945. He promised PICAO the full cooperation and assistance of IATA.

[35] The Council has set up three conference committees. The first deals with pooling of research and information on airfield lay-out and flying conditions; the second, with selection of routes, pooling of revenues, postal arrangements, and the type of aircraft to be used; and the third, with such technical details as radio and navigational facilities.

that country and the United Kingdom, believing that the traffic potential on the North Atlantic was sufficient to allow the economic operation of parallel airlines by itself and the United Kingdom, without the necessity of a pooling arrangement. Similarly, no pooling agreement was reached on a trans-Pacific route connecting Canada and Australia. The establishment of the Commonwealth Air Transport Council has been viewed in some quarters as an attempt, on the one hand, to create a solid British front on international civil aviation, and, on the other hand, to prove, through actual operating experience, that such pooling arrangements as have been concluded do not discourage enterprise, fail to reward the efficient operator, or hamper development and expansion.

A more indirect sequel to the Conference was the third Commonwealth and Empire Radio for Civil Aviation Conference (CERCA), held in London from August 7 to August 20, 1945. Prior conferences had been held in London in February, 1944, and in Ottawa in November, 1944. Delegates from the United Kingdom, Canada, Australia, and New Zealand, attended the Conference; and both the United States and the U. S. S. R. sent observers. Technical annexes of the Chicago Conference were used as a basis for discussions, particularly Annex A on Airways Systems, Annex B on Communications Procedures, and Annex D on Air Traffic Control Practices. The leading result of the Conference was the British decision to standardize on the use of presently-developed equipment for communications, air navigation and traffic control. This decision is in accord with United States practice, and the British designated for use specific types of equipment which are currently in use in this country. CERCA decided to keep in close touch wtih both PICAO and CINA.

Another sequel to the Chicago Conference, again on the governmental level, was the meeting of the International Commission for Air Navigation (CINA),[36] which was held in London from August 21 to 25, 1945. It was the first general meeting of the organization since 1939, and was attended by 20 of its 35 member states. The chief purpose was to bring CINA's technical annexes into conformity as far as possible with the draft annexes adopted at the Chicago Conference. Prior to the August meeting, a CINA Operating Subcommission had prepared comments and recommendations on the Chicago draft annexes, which were considered almost simultaneously by the meeting in London and the PICAO Council meeting in Montreal.

A further sequel to the Chicago Conference was the Third Inter-American Radio Conference, held in Rio de Janeiro from September 3 to 27, 1945. Although the official reports on the decisions of this Conference were not available at the time that this article was written, it was known that the Conference planned to discuss certain intricate issues of coordination between the broad international field of telecommunications and that of aviation. In the absence, in the past, of an international aviation organization having the adherence of a substantial number of countries in

[36] See *supra* note 9, p. 615.

the western hemisphere, the Inter-American telecommunciations conventions and regulations have contained many provisions governing aviation communications and navigational aids. It was expected that the Rio Conference would officially recognize the existence of PICAO, and turn over to that organization such parts of the regulations on aviation communications and aids as the latter could more efficiently handle, subject to such conditions as would prevent any unreasonable interference with other users of telecommunications.

Finally, there have been two important developments in the ten months since the Chicago Air Conference which, although not direct outgrowths of the Conference, have nevertheless had an important effect upon the manner in which international civil aviation operations will be carried on by the United Kingdom and the United States respectively, two of the principal participants in the Chicago Conference.

The first of these was the British White Paper of March 13, 1945.[37] This document outlined a plan whereby all British domestic and international civil aviation would be operated by three companies. The first company, the Government-owned British Overseas Airways Corporation (BOAC) would operate the Commonwealth routes (to India, Australia, and South Africa) as well as the trans-Atlantic services to the United States and Canada, and services to China and the Far East. It may be noted that, since 1940, BOAC has been Great Britain's "chosen instrument," i.e., her sole international airline. The second company, a new organization to be formed with participation by the British railway companies, the so-called "short sea" shipping lines, travel agencies, BOAC and pre-war independent airline operators, would be given the right to operate all internal air services in the United Kingdom as well as all routes from the United Kingdom to European points. The third company, also a new organization, to be owned by five British shipping lines as well as BOAC, would operate the services from the United Kingdom to South America. Thus, operations would be under a "zone" system, with no competition between the three companies. This White Paper has been severely criticized in some quarters in Great Britain, notably by pre-war independent operators, certain prospective new operators, and the aeronautical press. As of October 1, 1945, it had not yet been accepted as the basis for future British policy, and the Labour Party victory had not as yet clarified the situation.

The second development, by way of contrast, was the decision of the United States to enter the post-war international aviation field with a policy of "regulated competition," and with three American-flag airlines already certificated to fly routes across the North Atlantic. On July 5, 1945, the U. S. Civil Aeronautics Board, stating that the public interest required the operation of more than one American international air carrier, granted American Export Airlines, Pan American Airways, and Transcontinental & Western Air permission to fly trans-Atlantic routes; the services

[37] For text, see SEN. Doc. No. 29, 79th Cong., 1st Sess. ("Development of British Civil Air Transport," 1945).

of the first company are to extend eastward to Moscow, while the other two companies are to terminate their services in India.[38] It is expected that the Board's policy of "regulated competition" will be followed on routes from the United States to other areas of the world where the traffic potential appears sufficient to justify more than one American airline. Decisions on routes to Latin America, South Africa, and trans-Pacific routes to Asia and Australasia will probably be made within the next several months.

The operations of these American-flag routes, as well as of those flown by the airlines of Great Britain and all other nations of the world, are expected to be greatly facilitated by the steps taken at the Chicago Aviation Conference of 1944 and by the sequels to that Conference which have been discussed in this article.[39]

[38] Northeast Airlines, Inc. *et al.*, North Atlantic Route Case, CAB Docket No. 855, decided June 1, 1945.

[39] Owing to publication requirements, this article was originally written as of October 1, 1945. Prior to going to press, eight additional acceptances of the various Chicago agreements received in the period October 1-December 10, 1945, were added to Table B, and two additional bilateral air transport agreements were noted in Section VIII. During this same period, the PICAO Interim Council was in session for six weeks, and its Air Navigation and Air Transport Committees were in session for eight weeks. On the air navigation side, PICAO made substantial progress on completing a number of the Chicago draft technical annexes, and formulated a plan of regional organization within the PICAO framework. On the air transport side, a statistical reporting system for international airlines was evolved, the Secretariat was directed to begin extensive economic studies, and a start was made in attempting to reconcile the divergent views of member states regarding economic controls over international civil aviation. Finally, a procedure was established for the collection, analysis and publication of various types of international civil aviation agreements to which PICAO member states or their airlines are parties. The Interim Council recessed on November 30, 1945, and will convene again on January 21, 1946.

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